87-1416

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JANE CATLETT, PATRICIA LEEMBRUGGEN, GRACE TUTER AND ADELINE KALLEMYN, individually and on behalf of all others similarly situated,

Petitioners,

vs.

MISSOURI HIGHWAY AND TRANSPORTATION COMMISSION; ROBERT N. HUNTER, CHIEF ENGINEER OF THE MISSOURI HIGHWAY AND TRANSPORTATION COMMISSION AND V.B. UNSELL, DISTRICT ENGINEER FOR DISTRICT 8 OF THE MISSOURI HIGHWAY AND TRANSPORTATION COMMISSION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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February 22, 1988

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a showing of civil contempt is necessary before the District Court is empowered, under the remedial provisions of Title VII, to maintain continuing jurisdiction and to monitor the Defendants' recruitment and hiring practices which have been found to violate Title VII.

2. Whether a showing of civil contempt is necessary before the District Court is empowered, under the remedial provisions of Title VII, to order injunctive relief which includes goals for hiring and increasing the applicant pool of women upon a finding of intentional pattern and practice sex discrimination.

3. Whether the trial court is precluded from finding non-intentional discrimination against the individually named plaintiffs when the jury has found no intentional discrimination under 42 U.S.C. 1983.

4. Whether the class certified should have included all women in the State of Missouri rather than one geographic district of the Defendant Missouri Highway and Transportation Commission.

LIST OF ALL PARTIES TO THE PROCEEDING

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Patricia Leembruggen
Grace Tuter Shelley
Adeline Kallemyn
Aughty L. Bailey
Stari Buehler
Debre Farris
Debbie J. Fowler
Jayne L. Garrett
Debbie J. Lyons
Martha Patton
Evelyn Young
Glenda Bond
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Patricia Martone
Lucy Anderson
Joyce Bass
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Margaret Johnson-Wood
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Jackie Nelson
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Jerri Hill
Clara January
Pamela Joliff
Karen McKenzie
Virginia McMillin
Cheryl Main
Ricki Martinetti
Gala Minor-Carrier
Donna Muffitt
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No.

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Petitioners,

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MISSOURI HIGHWAY AND TRANSPORTATION COMMISSION; ROBERT N. HUNTER, CHIEF ENGINEER OF THE MISSOURI HIGHWAY AND TRANSPORTATION COMMISSION AND V.B. UNSELL, DISTRICT ENGINEER FOR DISTRICT 8 OF THE MISSOURI HIGHWAY AND TRANSPORTATION COMMISSION,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Petitioners, Jane Catlett, Patricia Leembruggen, Grace Tuter, and Adeline Kallemyn, individually and on behalf of all others similarly situated, respectively pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in the above-captioned proceeding on September 9, 1987.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 828 F.2d 1260 (8th Cir. 1980) and is reprinted in the Appendix hereto at page A-1.

The opinion of the United States District Court for the Western District of Missouri on the issue of liability is reported at 589 F.Supp. 929 (W.D.Mo. 1983) and is reprinted in the Appendix hereto at page A-25.

The opinion of the United States District Court for the Western District of Missouri regarding the remedy phase of the trial is reported at 627 F.Supp. 1015 (W.D.Mo. 1985) and is reprinted in the Appendix hereto at page A-63.

The opinion of the United States District Court for the Western District of Missouri regarding the certification of the class is not reported and is reprinted in the Appendix hereto at page A-79.

JURISDICTION

On September 9, 1987, the United States Court of Appeals for the Eighth Circuit issued its Order partially affirming, partially reversing and partially remanding the district court's judgment on liability and relief. On October 23, 1987, the United States Court of Appeals denied all petitions for rehearing.

On January 7, 1988, Justice Blackman signed an Order extending Petitioners' time to and including February 22, 1988 for filing Petition for Writ of Certiorari.

Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1) and 2101(c).

STATUTE INVOLVED

Title VII of the Civil Rights Act of 1964 provides in relevant part, as follows at 42 U.S.C. 2000e-5(g):

> (g) If the court finds that the Respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the Court may enjoin the Respondent from

> engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without backpay . . . or any other equitable relief as the court deems appropriate.

STATEMENT OF THE CASE

In June of 1975, Jane Catlett filed an EEOC charge of sex discrimination against the Missouri Highway Department which rejected her application for entry level "maintenance man" position. In March, 1978, Catlett filed a class action in the district court alleging a violation of Title VII of the 1964 Civil Rights Act and 42 U.S.C. Section 1983. Patricia Leembruggen, Grace Tuter and Adeline Kallemyn later intervened as named plaintiffs. The Plaintiffs alleged that the Missouri Highway and Transportation Commission intentionally discriminated against women in recruitment and hiring practices for an entry level position which required an eighth-grade education and an ability to operate light-weight motor equipment. Plaintiffs sought damages for back wages and lost benefits of employment, as well as declaratory and injunctive relief.

By order dated August 9, 1982, the court certified the class to include all women who applied or who might have applied for a "maintenance man" position in District Eight of the Highway Commission between January 1, 1975 and the last day of May, 1980. Plaintiffs had sought certification for a class of *all* women (all ten districts of the Missouri Highway Department) in the State of Missouri.

The trial of this case commenced on September 15, 1983 and concluded on September 23, 1983. On the Section 1983 claims, the jury returned verdicts in favor of the class and against the Commission, Hunter and Unsell and returned verdicts for the Defendants on the individual claims of the four named Plaintiffs.

On the Title VII claim, the court concluded that the Highway Commission, through its recruitment and hiring policies, engaged in a pattern and practice of sex-based discrimination against the class. The court also found that the four individual plaintiffs were victims of nonintentional sex discrimination under Title VII. The trial court found pervasive and purposeful sex discrimination by the Highway Commission in numerous phases of recruitment, selection and hiring for the maintenance position.

Among the findings made by the trial court were the following:

1. The job at issue, "maintenance man," was an entry-level position considered to be unskilled or semi-skilled, requiring a minimum of eighth grade education and an ability to operate light-weight motor equipment;

2. The Highway Department in District Eight relied primarily on word-of-mouth recruitment for filling new maintenance vacancies from January 1, 1975 through May 31, 1980;

3. The maintenance work force in District Eight was all male until December of 1976 when the first female was hired after Jane Catlett filed an EEOC charge;

4. Most applicants applied directly to the Highway Commission by walk-in application;

5. In December of 1976, the Chief Executive Officer of the Highway Department issued a directive to all District Engineers to the effect that the Commission's traditional methods of recruitment must no longer be relied upon to recruit female and minority applicants, and that advertising should be undertaken to increase the number of female and minority applicants. The memo directed that local population statistics should be used as the guide in recruitment efforts. Despite this knowledge, however, neither Chief Engineer Hunter nor the hiring officials in District Eight took any meaningful steps to implement the directive;

6. The percentages of women in the relevant labor pool ranged from forty-two percent (42%) in 1970 to forty-eight percent (48%) in 1980;

7. There was a statistically significant underrepresentation of women in the applicant pool for the maintenance position, as well as a statistically significant disparity in the number of women hires;

8. Women were discouraged from applying and then pursuing their applications for the maintenance position by the Highway Department's reputation for discrimination against women and by its practices of treating women disparately in the interview and selection process.

At the remedial stage of the litigation, Plaintiffs submitted as additional evidence a copy of a public record, the Report of the Federal Highway Administration, dated November 21, 1984 (over a year after the liability finding), which found "extensive deficiencies" in the Missouri Highway Department's EEO program, including its failure to have an approved affirmative action program and its failure to provide "minority female goals in annual increments over a five year period." In addition, with respect to the maintenance job, the report stated that women were underrepresented and further that "[t]he persistence of patterns of underrepresentation in the employment of minorities and women in the face of opportunities made available by attrition and coupled with the extraordinary minority termination rates indicate the existence of discriminatory hiring and other discriminatory practices."

In response to Plaintiff's evidence, the Highway Department claimed recent efforts to hire women for the maintenance job and recent efforts to train supervisors regarding EEO principles. At the remedial stage, the Highway Department offered evidence that in 1983 it employed in District Eight sixteen men and two women in the maintenance position; in 1984 twenty men and three women in the maintenance position. The

Highway Department also submitted a revised interview and application form, a revision of the job title of "maintenance man" to "maintenance crew member" and an affidavit stating that a four hour training program had been given to its supervisors.

On December 13, 1985, the district court granted summary judgment for the plaintiffs with respect to backpay and injunctive relief. The court did not feel bound by the jury verdict against the individually named plaintiffs because the jury passed only on the issue of intentional discrimination whereas the district court held that the named plaintiffs were victims of nonintentional discrimination. The court awarded the four named plaintiffs make-whole backpay relief.

The court awarded backpay to the members of the class as well, finding that but for the discrimination, thirty-eight vacancies for the maintenance position in District Eight would have gone to women. The court limited the total backpay liability to the class at thirty-eight (38) jobs and ordered that the one-hundred-fifty (150) class members should share the backpay according to a formula.

In addition to monetary relief, the court ordered certain injunctive relief. The court stated:

> While defendants argue that their voluntary efforts in changing their hiring practices are enough to preclude additional affirmative relief, the court finds the long history of discrimination and the comparatively short history of attempts to end such discrimination warrant further measures. . . . (A-69).

The court retained jurisdiction for four years "to monitor the implementation of this order and to require additional specific action, if necessary, to eradicate any remaining discrimination." In furtherance of its monitoring role, the court ordered the Highway Department to file a report on January 1 of each of four years showing a breakdown by sex of applicants and hires for the job in question.

The court also ordered the Highway Department to generate an actual pool of applicants for the maintenance job in District Eight consisting of thirty-seven to forty-eight percent women. Additionally, the court ordered that between thirty-seven to forty-eight percent of new vacancies for maintenance crew jobs in District Eight be filled with women, which percentage may include the eligible class claimants.

The United States Court of Appeals, in its opinion of September 9, 1987, reversed the district court on several issues pertinent to this Petition. First, the Court of Appeals removed the district court's maintenance of jurisdiction for four years and removed the reporting requirements which would enable the plaintiffs and the district court to monitor the Highway Department's compliance with the decree. Second, the Court of Appeals removed the hiring and recruitment goals and replaced them with a generalized injunction prohibiting further discrimination by Missouri. The Court held that affirmative relief was not appropriate absent a showing by plaintiffs that the Highway Department has engaged in contempt of court.

The Court of Appeals also found that the district court was estopped from finding nonintentional discrimination against the named plaintiffs by the jury verdict against the named plaintiffs on the issue of intentional discrimination.

Finally, the Court of Appeals found that the district court did not abuse its discretion in failing to certify a statewide class. Petitioners therefore seek review of the following actions of the Court of Appeals:

1. Removal of injunctive relief requiring reporting and monitoring; goals for recruitment of women; goals for hiring of women for four years;

2. Reversal of the make-whole backpay relief for the individually named plaintiffs;

3. Affirmance of the district court's limitation of the class to District Eight of the Missouri Highway and Transportation Commission.

REASONS WHY CERTIORARI SHOULD BE GRANTED

I. The United States Court Of Appeals For The Eighth Circuit's Decision Addresses An Important Federal Question Regarding Affirmative Relief In A Title VII Sex Discrimination Case Which Has Not Been, But Should Be, Settled By This Court And Which Is In Conflict With Applicable Decisions Of This Court.

In *Sheet Metal Workers v. EEOC,* 106 S.Ct. 3019, 3045 (1986), Justice Brennan stated that:

> [t]he language of Section 706(g) plainly expresses Congress' intent to vest district courts with broad discretion to award appropriate equitable relief to remedy unlawful discrimination. *Teamsters v. United States,* 431 U.S. 324, 364 (1977); *Franks v. Bowman Transportation Co.,* 424 U.S. 747 (1976); *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 421 (1975).

Six justices agreed that a district court may "in appropriate circumstances, order preferential relief benefiting individuals who are not the actual victims of discrimination as a remedy for violations of Title VII." 106 S.Ct. at 3054. There were four factors in the *Sheet Metal Workers* case which supported the district court's imposition of goals:

1. The Defendant union had a long and egregious history of racial discrimination;

2. The flexible application of the membership goal indicated it was being used as a benchmark and not simply to achieve or maintain racial balance;

3. The membership goal was temporary; and

4. Neither measure unnecessarily trammelled upon the interests of white employees.

See id. at 3050-52.

The United States Court of Appeals in this case has added to this body of law a threshhold requirement before vesting the district court with discretion to enter even the most unobtrusive relief imaginable, monitoring and reporting. In effect, the court held that absent a showing of contempt, the district court is not empowered to award affirmative relief under Title VII with respect to recruitment and hiring practices and monitoring and reporting requirements if the relief in question might incidentally benefit persons who have not been identified as victims of discrimination.

Referring to *Local 28, Sheet Metal Workers International Association v. EEOC,* 106 S.Ct. 3019 (1986) and *United States v. Paradise,* 107 S.Ct. 1053 (1987), the Eighth Circuit explained its reasoning for removing the affirmative relief ordered by the district court:

> The Supreme Court in each instance emphasized that the lower court had mandated affirmative action only after the defendant had failed to live up to *court-ordered* commitments to eliminate discriminatory practices. *See Paradise,* 107 S.Ct. at 1066. Thus, race-conscious remedies benefiting nonvictims were supported not only by the societal interest in eradicating discrimination, but also by the societal interests in ensuring compliance with *court decrees* and eliminating the effects of delays in compliance. *Id.* at 1067; *see also Sheet Metal Workers,* 106 S.Ct. at 3055 (Powell, J., concurring).
>
> Applying these principles to the case before us, we cannot say Missouri has a "long history of 'foot-dragging' resistance to *court orders*" such that simply enjoining the state from further discriminatin would clearly be futile. See *Id.* at 3051. The Supreme Court has not yet approved a court-ordered race- or gender-conscious remedy against a defendant which has not been given a chance voluntarily to bring its personnel practices into compliance with a

> generalized injunction against further discrimination. We decline to take that step here. (Emphasis added)

(A-17).

There is no question that this case involves egregious, long-standing and persistent discrimination on the part of the Missouri State Highway Commission. As the district court noted:

> It is a serious matter when any employer engages in employment discrimination, but it seems particularly grave for the state to practice discrimination against its own citizens, as these are the people who pay the taxes that support and maintain the government, and whom the elected and appointed officials are to serve. It is distressing and demeaning that a branch of the Missouri state government should be guilty of unlawful discrimination against its own citizens.

(A, 61-62).

The district court had before it evidence that the Highway Department persisted in discriminating against women even after the finding of liability. The Federal Highway and Transportation Administration's Report, issued more than a year after trial on the liablity phase, stated that the Highway Department persisted in its failure to comply with the law. The district court had also found that as early as 1976, the Highway Department was aware of the urgent need to revise its recruitment practices and of the underrepresentation of women in the maintenance work force. Yet, the Highway Department took no steps to comply with the law and knowingly failed to remedy the situation.

In spite of this record of persistent, egregious and long-standing intentional discrimination against women, the Court of Appeals struck down all contested affirmative relief because there had been no violation of a court decree. The Court of Ap-

peals does not find that the goals imposed were unreasonable or that the monitoring and reporting requirements were burdensome. Yet, with one broad motion, the Court of Appeals discards even the least drastic affirmative relief imaginable, reporting and monitoring requirements.

By requiring a showing first of contempt of court, the Eighth Circuit has effectively destroyed the broad remedial powers of the trial court under Title VII which this Court had affirmed in *Sheet Metal Workers, Teamsters v. United States, Franks v. Bowman Transportation Co.*, and *Albemarle Paper Co. v. Moody.*

A. MONITORING AND REPORTING.

This kind of injunctive relief — imposing requirements for periodic reporting to the Court — is essential to monitor compliance with the nondiscrimination injunction when the employer has demonstrated a longstanding unwillingness to change its discriminatory practices. *See General Building Contractors Association v. Pennsylvania,* 458 U.S. 375, 404 (1982) (O'Connor, J., *concurring*). The appeals court has left plaintiffs in a "Catch 22" situation. Plaintiffs must show *contempt* before the district court may order the Highway Department to report its hiring policies and practices. Yet, without the data, plaintiffs have no way of knowing whether the Highway Department is complying with the decree! Thus, even the least drastic "affirmative relief" imaginable is thrown out because there is no history of contempt. Such wholesale rejection of affirmative relief of any kind whatsoever is a serious erosion of this Court's interpretation of Title VII's remedial provisions.

B. RECRUITMENT GOALS

The Court of Appeals has effectively held that absent a showing on contempt, the district court is not empowered to award affirmative relief with respect to recruitment and hiring practices, if that relief is not confined exclusively to identifiable victims.

It is virtually impossible to identify victims of recruitment discrimination. These are the very women who do not apply and who are discouraged from pursuing job opportunities. A goal of thirty-seven to forty-eight percent female for increasing the female applicant pool is certainly within the trial court's discretion under the facts of this case. There are no innocent victims of such affirmative relief, and it is not designed to achieve a gender-balanced work force. It is designed, however, to end the "lingering effects of pervasive discrimination" where the Highway Department has a longstanding reputation for discouraging women from applying. Despite knowledge of serious underrepresentation of women in the applicant pool as early as 1986, the Highway Department continued to actively discourage women from pursuing job opportunities. The trial court found that the female applicant pool was chilled by the Commission's discriminatory practices. The district court's remedial order with respect to the recruitment practices is designed to increase the applicant pool of females over a four year period of time. There is no way to identify any victims of discriminatory recruitment practices. They simply do not come forward as they are the "chilled" applicant pool. But the Eighth Circuit's holding is an apparent major condemnation of *any* affirmative relief which benefits nonvictims of discrimination, no matter what the context, absent a showing of contempt. This was not the intent of the Court in *Sheet Metal Workers.* In fact, the Eighth Circuit's holding conflicts with this Court's reasoning in *Sheet Metal Workers.*

Affirmative action in recruitment has been characterized by this Court in *Sheet Metal Workers* as a "less harsh" type of affirmative action. *See Sheet Metal Workers v. EEOC,* 106 S.Ct. 3019, 3050 n. 46 (1986). It is the kind of relief necessary when a general injunction would not have been sufficient to extend to women equal opportunities for employment. Applicant pool goals are widely used as a painless remedial device to reverse the effects of discrimination against women. This Court's review is necessary in order to preserve this kind of affirmative action in

cases where egregious and longstanding discrimination falls short of actual contempt of court.

C. HIRING GOALS.

As make-whole relief for the identified class members, the district court placed eligible class claimants who desire a maintenance job on a preferential hiring list (A-70). The Court of Appeals let stand the preferential hiring but limited it to thirty-eight (38) vacancies which is the number of jobs that would have gone to women absent discrimination (A-16).

The affirmative relief at issue is the district court's imposition of a hiring goal for new vacancies over the next four years. The district court required the Highway Department to fill between thirty-seven percent (37%) to forty-eight percent (48%) new vacancies for maintenance man over the next four years with women *which may include* the eligible class claimants (A-72). Since the average number of vacancies per year is twenty (20) (assuming no hiring freeze), the goal of hiring between thirty-seven percent (37%) to forty-eight percent (48%) women for new vacancies can be entirely met by filling vacancies with eligible class claimants. Consequently, the affirmative hiring goal imposed by the district court is merely a guidelne and only benefits "nonvictims" if the class members choose not to be hired first. The Court of Appeals' rejection of this innocuous guideline, absent a showing of contempt, demonstrates a knee-jerk response to any remedy labeled "affirmative action."

The hiring goal in this case amounts to nothing more than a mere guideline for the district court and for the Highway Department. It is not intended to balance the workforce; it does not injure innocent males; it is certainly flexible in that it benefits primarily victims of discrimination and it is ordered in the context of longstanding and egregious sex discrimination.

The Appeals Court has left the plaintiffs with an injunction which simply reiterates Title VII's prohibition against dis-

crimination. It is the kind of injunction which is useless in the face of recalcitrant employers such as the Missouri Highway Department.

The Appeals Court's requirement of a showing of contempt before allowing even the most innocuous form of affirmative relief following a finding of intentional pattern and practice of discrimination against women as a class is a decision upon an important question of federal employment law requiring this Court's review. If affirmative relief such as that awarded here is not allowable in a sex discrimination case where there is proof of egregious and longstanding intentional discrimination, then the remedial provisions of Title VII allowing injunctive relief will be seriously undermined. If left to stand, the decision will endanger well-established principles set by this Court to guide lower federal courts in exercising their discretion under the remedial provisions of Title VII.

II. The Decision Below Regarding The Issue Of Relief For The Four Named Plaintiffs Raises Significant And Recurring Questions Of Whether Elements Of An Unregulated, Subjective Hiring Process May Be Evaluated Under The Adverse Impact Model Of Proof Under Title VII.

The trial court found that the individually named plaintiffs were victims of the "biased interview process and the unregulated hiring procedure" and characterized this finding as one of disparate impact (A-64). Consequently, the court rejected the Highway Department's assertion that the jury finding against the individually named plaintiffs on intentional discrimination under the 42 U.S.C. 1983 precluded the court's independent finding of nonintentional discrimination against the individually named plaintiffs under Title VII. The Highway Department did not assert its "collateral estoppel" argument, however, until *after* the district court made its findings on the issue of liability in its initial Order of December 5, 1983 (A-64).

Consequently, the court below was deprived of the opportunity to discuss fully the specific ways in which the policies and practices fostered by the unregulated hiring process, although fair in form, adversely impacted on the class and individually named plaintiffs.

The Court of Appeals, addressing the plaintiffs' argument that estoppel does not apply because the district court's Title VII findings in favor of the plaintiffs went beyond those made by the jury, states:

> As we understand the district court's opinion, however, the court drew a specific legal conclusion of disparate impact only with regard to Missouri's reliance on word-of-mouth recruiting, finding that the existing predominantly male work force communicated information on job openings primarily to other males. . . . Since the individual plaintiffs all applied for maintenance positions, they were not victims of this discriminatory practice, and they cannot benefit from the court's disparate impact analysis. (A-7)

Consequently, the Court of Appeals missed the court's finding regarding the "unregulated hiring process" as it impacted on the named plaintiffs and glosses over the issue of whether or not identifiable components of an unregulated process which adversely impact on women may support a finding of nonintentional discrimination. For example, in its initial judgment on liablity, the court found that the Highway Department's application form was inadequate because it did not request a listing of relevant and nonpaid experience operating lightweight motor equipment, one of the two qualifications for the job. The court found that:

> [N]umerous female applicants for the maintenance man position had experience with lightweight motor equipment through nonpaid or self-employed farm and trucking experience, but were not able to indicate this type of experience on the application form. Not all applicants for

the position of maintenance man were interviewed for this position, however, as some applicants were screened on the basis of information contained on the application form, or on the basis of the personal knowledge of the selecting official regarding a particular applicant. As a result of the failure of the application form to provide a space for the listing of unpaid experience or lightweight motor equipment experience, there was a reduced likelihood that these otherwise qualified female applicants would be selected for an interview. (A-37)

This finding is one of adverse impact with respect to a practice fair in form (failure to ask nonpaid or even paid lightweight motor equipment experience). Yet, in the face of this finding, the appeals court notes that with respect to Patricia Leembruggen, a "nondiscriminatory" reason for not hiring her was her failure to list on the application her lightweight equipment skills (A-8). The trial court, however, has found this practice to be discriminatory and further found that the named plaintiffs were victims of adverse impact discrimination under Title VII because they too suffered the effects of the unregulated hiring process. The "nondiscriminatory reasons" articulated by the Highway Department for not hiring the individually named plaintiffs were all challenged by plaintiffs as neutral policies without business justification which adversely impact on women (i.e., Highway Department's preference for applicants with previous maintenance experience favoring males - articulated as a defense to failure to hire Kallemyn and Leembruggen; Highway Department's failure to consider applicants for more than one vacancy - combined with few female applicants adversely affects women - affected all named plaintiffs, etc.). Plaintiffs' arguments were made but not specifically addressed by the trial court in its findings on liability because it wasn't necessary to do so at that time. The Highway Department had not yet offered its "collateral estoppel" argument against relief for the individual plaintiffs.

The issue of whether nonintentional impact analysis may be applied to evaluate the legality of an unregulated, subjective selection process is presently before the Court in *Watson v. Fort Worth Bank & Trust,* No. 86-6139. The various circuits have not demonstrated any consistency on this issue, including the Eighth Circuit. *See Tally v. United States Postal Service,* 720 F.2d 505 (8th Cir. 1983), *cert. denied,* 466 U.S. 952 (1984); *Harris v. Ford Motor Co.,* 651 F.2d 609 (8th Cir. 1981) (refusing to apply impact analysis); *contra Gilbert v. Little Rock,* 722 F.2d 1390 (8th Cir. 1983), *cert. denied,* 104 S. Ct. 2347 (1984) (applying disparate impact analysis to subjective selection process). Recently, the Ninth Circuit Court of Appeals found that adverse impact analysis may be applied to a subjective selection process, joining a clear majority of circuits as well as the Equal Employment Opportunity Commission on this very important issue. *See Atonio v. Wards Cove Packing Co.,* 810 F.2d. 1477 (9th Cir. 1987). If this court finds in *Watson* that adverse impact analysis may be applied to evaluate the legality of an unregulated, subjective hiring process, then the named plaintiffs should prevail under Title VII. The trial court's finding in favor of the named plaintiffs should not then be collaterally estopped by the jury's finding on intentional discrimination.

III. The Issue Of The Scope Of The Class Is An Important Federal Question Which Has Not Been, But Should Be Settled By This Court.

The trial court refused to certify a statewide class based on commonality and manageability. In its Certification Order of August 9, 1982, the court found that "[e]ach district office implements its own employment policies with respect to recruitment and selection of employees." Therefore, the court decided that the questions of fact would not be common across the state because of the differences in the hiring process in the ten districts. In addition, the trial court found that a trial on the merits would be unmanageable if the class included all ten districts. The court gave no explanation as to why the action

would be unmanageable, however (A-86). Then, at the liability trial, the court found that personnel and employment policies are formulated and controlled by the Commission's headquarters (A 33-34).

Rule 23(a) requires a class to be sufficiently homogenous and definable so that those bound by the judgment are capable of determination. Rule 23(a)(2) provides that "one or more members of the class may sue or be sued as representative parties on behalf of all only if . . . there are questions of law or fact, common to the class." The Eighth Circuit has noted that "the rule does not require that every question of law or fact be common to every member of the class." *Paxton v. Union National Bank,* 688 F.2d. 552 (8th Cir. 1982). What is required for a Rule 23(b)(2) class is that common questions of law or fact predominate over individual questions, not that every claim be identical. These principles are the starting point for determining the geographic scope of the class.

Even some decentralization of actual decision-making does not preclude class treatment because an overall policy may be implemented through local decisions. *See, Soffard v. Safeway Stores, Inc.,* 78 F.R.D. 460 (N.D.Cal. 1978). In *Karan v. Nabisco,* 78 F.R.D. 388 (W.D.Penn. 1978), the court stated that a statewide class may be appropriate even where the terms, conditions and practices of employment vary between facilities if the discrimination is system wide and if central administration knew of the discriminatory policies and permitted them to continue.

In this case, plaintiffs submitted an offer of proof in the form of statistical evidence showing that discrimination in the Highway Department was systemized rather than limited to a particular area or facility. A statewide class is appropriate when plaintiffs' statistics, broken down by facility, indicate that the discriminatory effect on women is not isolated or unique to one facility. *Stastny v. Southern Bell,* 628 F.2d. 267 (4th Cir. 1980)

It is clear that a statewide class in this case would have been more appropriate than merely one district of the Missouri Highway and Transportation Department. The trial court here denied certification of a statewide class merely on the basis of convenience. Because the purpose of Rule 23 is to avoid multiplicity of suits when the alleged wrong is suffered by all potential members across the state, the trial court and the appeals court have undermined Rule 23. The proper standard for determining manageability is "to compare the fairness and/or efficiency of maintaining a suit as a class action to alternate methods." *Herbst v. International Telephone and Telegraph Co.*, 65 F.R.D. 13 (D.Conn. 1973), *affirmed* 495 F.2d. 1308 (2nd Cir. 1974).

Consequently, if left to stand, the Court of Appeals ruling regarding the scope of the class will seriously undermine the efficacy of Rule 23 in employment litigation. The trial court's decision requires review by this Court in order to preserve the class action device in employment discrimination cases.

CONCLUSION

For all the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted,

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February 22, 1988

No. 87-1416

Supreme Court, U.S.
FILED
FEB 22 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JANE CATLETT, PATRICIA LEEMBRUGGEN, GRACE TUTER AND ADELINE KALLEMYN, individually and on behalf of all others similarly situated,

Petitioners,

vs.

MISSOURI HIGHWAY AND TRANSPORTATION COMMISSION; ROBERT N. HUNTER, CHIEF ENGINEER OF THE MISSOURI HIGHWAY AND TRANSPORTATION COMMISSION AND V.B. UNSELL, DISTRICT ENGINEER FOR DISTRICT 8 OF THE MISSOURI HIGHWAY AND TRANSPORTATION COMMISSION,

Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-1087

Jane Catlett, Patricia Leembruggen,
Grace Tuter and Adeline Kallemyn,
individually and on behalf of all
others similarly situated,
Appellees,

v.

Missouri Highway and Transportation Commission;
Robert N. Hunter, Chief Engineer of the
Missouri Highway and Transportation Commission and
V.B. Unsell, District Engineer for District 8 of the
Missouri Highway and Transportation Commission,
Appellants.

No. 86-1115

Jane Catlett, Patricia Leembruggen,
Grace Tuter and Adeline Kallemyn,
individually and on behalf of all
others similarly situated,
Appellants,

v.

Missouri Highway and Transportation Commission;
Robert N. Hunter, Chief Engineer of the
Missouri Highway and Transportation Commission and

V.B. Unsell, District Engineer for District 8 of the
Missouri Highway and Transportation Commission,
Appellees.

No. 86-1860

Jane Catlett, Patricia Leembruggen,
Grace Tuter and Adeline Kallemyn,
individually and on behalf of all
others similarly situated,
Appellees,

v.

Missouri Highway and Transportation Commission;
Robert N. Hunter, Chief Engineer of the
Missouri Highway and Transportation Commission and
V.B. Unsell, District Engineer for District 8 of the
Missouri Highway and Transportation Commission,
Appellants.

No. 86-2252

Jane Catlett, Patricia Leembruggen,
Grace Tuter and Adeline Kallemyn,
individually and on behalf of all
others similarly situated,
Appellees,

v.

Missouri Highway and Transportation Commission;
Robert N. Hunter, Chief Engineer of the
Missouri Highway and Transportation Commission and

V.B. Unsell, District Engineer for District 8 of the Missouri Highway and Transportation Commission,
Appellants.

No. 86-2393

Jane Catlett, Patricia Leembruggen, Grace Tuter and Adeline Kallemyn, individually and on behalf of all others similarly situated,
Appellees,

v.

Missouri Highway and Transportation Commission; Robert N. Hunter, Chief Engineer of the Missouri Highway and Transportation Commission and V.B. Unsell, District Engineer for District 8 of the Missouri Highway and Transportation Commission,
Appellants.

No. 86-2459

Jane Catlett, Patricia Leembruggen, Grace Tuter and Adeline Kallemyn, individually and on behalf of all others similarly situated,
Appellants,

v.

Missouri Highway and Transportation Commission; Robert N. Hunter, Chief Engineer of the Missouri Highway and Transportation Commission and

V.B. Unsell, District Engineer for District 8 of the Missouri Highway and Transportation Commission,

Appellees.

Appeals from the
United States District Court
for the Western District of Missoui

Submitted: April 16, 1987

Filed: September 9, 1987

Before FAGG, Circuit Judge, BRIGHT, Senior Circuit Judge, and MAGILL, Circuit Judge.

FAGG, Circuit Judge.

These appeals and cross-appeals follow the entry of judgment partially in favor of and partially against the Missouri Highway and Transportation Commission in a suit combining individual and class sex discrimination claims. Our review will focus on five major issues: (1) the estoppel effect of the jury verdict on a district court acting as factfinder on coexisting equitable claims; (2) the sufficiency of the evidence of class discrimination in a case combining statistical and anecdotal evidence; (3) the calculation of class back pay awards; (4) the propriety of orders imposing gender-conscious goals with respect to future hiring; and (5) the enhancement of attorney fees. We affirm the state's liability to the class but reverse the state's liability to the individual plaintiffs and remand for modification of the relief awarded and for further proceedings consistent with this opinion.

The allegations of discrimination in this case focus on Missouri's practices and policies in hiring highway maintenance workers. Requirements for this entry-level position are an eighth-grade education and an ability to operate lightweight

motor equipment, and duties include mowing highway right-of-ways, plowing snow, filling potholes, maintaining rest areas, and performing minor service and repairs on equipment. The individual plaintiffs, Jane Catlett, Grace Tuter, Adeline Kallemyn, and Patricia Leembruggen, all applied for and were denied maintenance positions in District Eight of the Missouri Highway and Transportation Commission. These women are also members of the plaintiff class, which consists of all females who applied or might have applied for maintenance positions in District Eight between January 1, 1975, and May 31, 1980. District Eight had never employed a female maintenance worker as of July 1975, when Catlett filed the state administrative complaint that evolved into this litigation, and the District during the time period defined by the class hired eighty-nine males and only eight females.

The individual plaintiffs and the class base their claims on two federal statutes, section 1983 (that is, 42 U.S.C. §1983) and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2. To prevail under section 1983 the individuals and the class had to prove Missouri intentionally treated them less favorably because of their sex. *See Foster v. Wyrick,* 823 F.2d 218, 221 (8th Cir. 1987). Under Title VII these claimants had the option of proving disparate treatment, that is, Missouri engaged in intentional discrimination as under section 1983, or disparate impact, that is, Missouri employed facially neutral hiring practices that in fact operated to limit job opportunities for women. *See generally International Bhd. of Teamsters v. United States,* 431 U.S. 324, 335 n.15 (1977) (distinguishing disparate treatment and disparate impact theories of discrimination). The individual and class section 1983 claims were tried to a jury while the individual and class Title VII claims simultaneously were tried to the court. *See Harmon v. May Broadcasting Co.,* 583 F.2d 410, 410 (8th Cir. 1978) (per curiam).

The jury on the individual section 1983 claims returned a verdict in favor of Missouri, thus finding no intentional discrimina-

tion. The district court, however, reached a contrary conclusion when under Title VII it held for the individual plaintiffs on a disparate treatment theory. *Catlett v. Missouri Highway & Transp. Comm'n (Catlett I),* 589 F. Supp. 929, 947-49 (W.D. Mo. 1983). The jury and the court both found intentional discrimination by Missouri against the class, and the court also found Missouri's employment practices had a disparate impact on the class. *Id.* at 944-47. This disparate impact conclusion pinpointed Missouri's word-of-mouth recruiting system as the neutral factor artificially limiting opportunities for women. *Id.* at 947.

At the remedial stage the district court awarded back pay to the individual plaintiffs and the class and retained jurisdiction over the suit until January 1, 1990, to monitor the implementation of a broad order of affirmative relief. *Catlett v. Missouri State Highway Comm'n (Catlett II),* 627 F. supp. 1015 (W.D. Mo. 1985); *see also Catlett v. Missouri Highway & Transp. Comm'n (Catlett III),* 643 F. Supp. 321 (W.D. Mo. 1986) (setting actual back pay amounts). The court in this order granted a classwide hiring preference, thus giving priority for future job openings to all class members still desiring employment as maintenance workers, and set a goal of thirty-seven to forty-eight percent female for the maintenance applicant pool and for District Eight maintenance hires during the pendency of the court order. *Catlett II,* 627 F. Supp. at 1020, 1021. The court also called for the designation "maintenanceman" to be replaced with a sex-neutral title and detailed new recruiting, application, and interview procedures to be followed by Missouri. *Id.* at 1020-22. Finally, the district court in a later order awarded the plaintiffs attorney fees of $505,907.62 based on a fifty-percent enhancement of the hours-times-rate "lodestar" figure.

I.

Missouri argues the district court was bound by the jury verdicts in the state's favor on the individual section 1983 claims and thus lacked the power to make contrary factual findings

and enter judgments against Missouri on the individual Title VII claims. The individual plaintiffs acknowledge the principle of law on which Missouri relies, *see Garza v. City of Omaha,* 814 F.2d 553, 556 (8th Cir. 1987); *Goodwin v. Circuit Court,* 729 F.2d 541, 549 n.11 (8th Cir.), *cert. denied,* 469 U.S. 828 (1984), but they offer three reasons why it should not apply to bar their individual Title VII recoveries here.

First, the individual plaintiffs point to Missouri's failure to rely on estoppel by jury verdict when submitting to the court proposed conclusions of law on the Title VII claims. Missouri did raise the estoppel issue at the remedial stage, *Catlett II,* 627 F. Supp. at 1017, and this satisfies our concern that a district court be given the opportunity to consider and correct perceived errors, *see Edwards v. Hurtel,* 724 F.2d 689, 690 (8th Cir. 1984) (per curiam). The *Goodwin* case, in which this court declined to apply estoppel, is distinguishable because of its "peculiar circumstances": Estoppel in that case had not been raised either to the district court or on appeal, and the party against whom estoppel was asserted had not been a party to the claim decided by the jury. *See* 729 F.2d at 549 n.11. We believe we may properly reach the estoppel issue here.

Second, the individual plaintiffs argue estoppel does not apply because the district court's Title VII decisions were based on findings beyond those made by the jury. Specifically, the individual plaintiffs point out that while the jury under section 1983 considered only the existence of intentional discrimination, the court under Title VII also considered the existence of unintentional discrimination resulting from the use of a facially neutral employment practice. As we understand the district court's opinion, however, the court drew a specific legal conclusion of disparate impact only with regard to Missouri's reliance on word-of-mouth recruiting, finding that the existing predominantly male work force communicated information on job openings primarily to other males. *See Catlett I,* 589 F. Supp. at 946-47. Since the individual plaintiffs all applied for

maintenance positions, they were not victims of this discriminatory practice, and they cannot benefit from the court's disparate impact analysis.

Third, the individual plaintiffs would avoid estoppel by voiding the jury verdicts: They argue the district court committed error by failing to grant them judgments notwithstanding the verdict on their individual claims. The judgments notwithstanding the verdict, however, were properly denied if, resolving all factual conflicts in favor of Missouri and giving Missouri the benefit of all favorable inferences, the evidence was sufficient to support the jury's conclusions. *See Gilkerson v. Toastmaster, Inc.*, 770 F.2d 133, 136 (8th Cir. 1985). We assess the sufficiency of the evidence on the ultimate question of whether Missouri intentionally discriminated against the individual plaintiffs. *See id.* at 135 (citing *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 714-15 (1983)); *see also Craik v. Minnesota State Univ. Bd.*, 731 F.2d 465, 468 & n.5 (8th Cir. 1984) (section 1983 employment claim follows Title VII disparate treatment analysis).

The record suggests a variety of nondiscriminatory reasons for Missouri's refusals to hire the individual plaintiffs. Catlett in the first instance applied for a position after a hiring decision possibly had already been made (although not officially approved) and in future instances refused to update her application with the name of her current employer. Tuter and Kallemyn interviewed for vacancies eventually filled by males with prior highway maintenance experience, and Leembruggen did not list on her application the lightweight equipment skills required for the job. In addition, although each plaintiff's application remained active for a year, the state had a policy of considering most maintenance candidates only once during that period. The individual plaintiffs respond that certain of these hiring rationales, while facially legitimate, are inherently discriminatory and as a matter of law cannot support the individual verdicts in favor of Missouri. *Cf. O'Connor v. Peru State College*, 781

F.2d 632, 636 (8th Cir. 1986). The individual plaintiffs, however, did not raise this argument in their motion for judgments notwithstanding the verdict, and they do not on appeal find fault with the jury instructions for failing to reflect this theory. Any challenge to Missouri's hiring rationales as being inherently discriminatory has not been adequately raised and preserved.

Because the record contains ample evidence to support the jury's verdicts for Missouri on the individual section 1983 claims, we affirm those verdicts and further hold the verdicts bar judgments against Missouri on the individual Title VII claims.

II.

Turning to the class claims, we focus our review on the jury's and court's findings of intentional discrimination. A finding of classwide intentional discrimination requires proof by a preponderance of evidence that the employer engaged in a pattern or practice of unlawful discrimination. *Briggs v. Anderson,* 796 F.2d 1009, 1019 (8th Cir. 1986); *see also Hervey v. City of Little Rock,* 787 F.2d 1223, 1228 n.3 (8th Cir. 1986) (same test under section 1983 as under Title VII). A pattern or practice is present when the discriminatory acts were not isolated, insignificant, or sporadic, but were repeated, routine, or of a generalized nature; in other words, discrimination must have been "the company's standard operating procedure — the regular rather than the unusual practice." *Teamsters,* 431 U.S. at 336 & n.16.

The class in this case presented both statistical evidence revealing a disparity between the number of females hired and the number expected to be hired and anecdotal evidence recounting instances of discrimination against specific class members. Either of these types of proof alone may be sufficient to establish a pattern or practice of discrimination, *see Hazelwood School Dist. v. United States, 433 U.S. 299, 307-08*

(1977) (statistics); Briggs, 796 F.2d at 1019 (anecdotal evidence); thus, neither is "automatically entitled to reverence to the exclusion of the other." *Coates v. Johnson & Johnson,* 756 F.2d 524, 533 (7th Cir. 1985). For example, while a class claim may fail despite proof of discrimination against one or more individuals, a class claim may succeed despite employer rebuttal of alleged instances of discrimination involving class representatives and testifying class members. *Id.* at 532-33. The inadequacy of the class' statistics by themselves to establish discrimination does not foreclose recovery; rather, the question is whether the totality of the evidence makes it more likely than not that the statistical disparity between expected and actual female hires resulted from discriminatory decisionmaking. *See Palmer v. Shultz,* 815 F.2d 84, 96-97 (D.C. Cir. 1987); *see also Bazemore v. Friday,* 106 S.Ct. 3000, 3009 (1986). Missouri's statistical arguments thus will not alone be dispositive, and we need just examine the class' statistical evidence (the admissibility of which is not challenged on appeal) for whatever weight it might contribute to the class disparate treatment judgments.

In this case the record of anecdotal evidence, read in the light most favorable to the class, reveals numerous instances suggesting Missouri was not receptive to the idea of female maintenance workers. For example, one supervisor, upon being told that a woman had applied for a maintenance position, became angry and said, "You send that [expletive] in here, and now I'm going to have to hire her." Another female was advised not to apply at a particular location because "the fellow up there is not about to hire a woman."

The male highway employees responsible for interviews and hiring tended to discount female applicants' abilities and expressions of interest in maintenance work: one was told the job was "very physical * * * for a woman"; one was told, "I don't think you want this job"; one was referred to a secretarial job; and one was encouraged to return to teaching. In filling out review sheets interviewers discounted farm and other types of ex-

perience listed by female applicants while finding similar experience relevant when possessed by male applicants. One woman was deemed "not one to do dirty work" even though at the time of her interview she lived and worked on a farm and her background included work on a chicken ranch. Other review sheets remarked on female applicants' looks, including, for example, speculation that one woman interviewee was wearing false eyelashes.

During the interviews the male supervisors emphasized the unpleasant aspects of the maintenance job, such as the lack of restroom facilities and the removal of dead animals from the road; questioned whether women might be offended by the language of male coworkers; and suggested that the female applicants' husbands might object to their maintenance work. One woman was told she might have to lift a 100-pound snowplow by herself, even though the men usually didn't have to do it alone. Occasionally the interviews were conducted not privately but in the presence of a number of male workers who would snicker and tell "scare stories" about unpleasant things that had happened on the job. Female applicants had difficulty interesting interviewers in their qualifications; some were never told of the salary or benefits for the maintenance job; and at least two were informed the highway department already had men in mind for the openings for which they were being considered. As a result of their interviews female applicants generally felt they were not being seriously considered for maintenance positions, and one was even so discouraged by a pre-interview phone conversation of this nature that she decided not to attend her interview.

The class' statistical evidence, which reveals that females constituted up to forty-eight percent of the relevant work force, compared to less than ten percent of Missouri's maintenance hires during the class period, serves to reinforce the suggestion that these discriminatory incidents were not isolated or sporadic but were representative of Missouri's standard operating pro-

cedure. While Missouri argues that the class in defining the relevant work force failed to consider the actual interest of otherwise qualified men and women in maintenance work, Missouri bore the burden of introducing evidence to show this failure was significant: "[M]ere conjecture or assertion on [a] defendant's part that some missing factor would explain the existing disparities between men and women generally cannot defeat the inference of discrimination created by [a] plaintiff['s] statistics." *See Palmer,* 815 F.2d at 101 & n.13 (interpreting evidence demonstrating that a lesser interest in highway maintenance work on the part of females accounted for the disparity between the percentage of such positions held by females and the percentage of females in the work force defined by the class. Expert testimony from both sides established that Missouri's statistics showing no discrimination also did not necessarily accurately reflect male versus female interest. The jury and court were entitled to consider the class' statistics and judge their credibility. *See id.*

Furthermore, Missouri cannot shield itself from liability by pointing out that it hired 2.6 percent of female maintenance applicants (8 of 312) and only 2.5 percent of male maintenance applicants (89 of 3,566). Victims of a discriminatory policy cannot be told they have not been wronged because other females have been hired. *See Connecticut v. Teal,* 457 U.S. 440, 455 (1982); *see also, e.g., Craik,* 731 F.2d at 474 (males and females were selected at equal rates but no female ever prevailed when another candidate was male). While the equal hiring rate constituted relevant evidence, *see Teal,* 457 U.S. at 454, it did not entitle Missouri to judgment as a matter of law. The jury and court were free to weigh the inference of nondiscrimination arising from the hiring rate against the inference of discrimination arising from the class' anecdotal and statistical evidence.

This evidence, viewed in its totality, was sufficient to support the jury's verdict and the court's conclusion that Missouri in hiring highway maintenance workers engaged in a pattern or

practice of discrimination against women. *See Anderson v. City of Bessemer City,* 470 U.S. 564, 573-76 (1985); *Gilkerson,* 770 F.2d at 136. We uphold the judgments in favor of the class under both section 1983 and Title VII.

III.

Victims of discrimination under Title VII are entitled to be "made whole," that is, to be restored, as nearly as possible, to the positions in which they would have been absent the discrimination. *Franks v. Bowman Transp. Co.,* 424 U.S. 747, 763-64 (1976); *Briseno v. Central Technical Community College Area,* 739 F.2d 344, 347 (8th Cir. 1984); *see* 42 U.S.C. §2000e-5(g). The scope of the relief, such as back pay, to be awarded each member of a prevailing class generally will be determined through individualized hearings, with the court recreating past employment relationships to determine when a particular class member should have been hired. *Teamsters,* 431 U.S. at 361, 371-72; *see Hameed v. International Ass'n of Bridge, Structural & Ornamental Iron Workers,* 637 F.2d 506, 519 (8th Cir. 1980).

A court, however, retains equitable discretion to fashion an appropriate remedy when, for example, the number of qualified class members exceeds the number of openings lost to the class through discrimination and identification of the individuals entitled to relief would "drag the court into 'a quagmire of hypothetical judgments' " and result in "mere guesswork." *Segar v. Smith,* 738 F.2d 1249, 1289-90 (D.C. Cir. 1984) (quoting *Thompson v. Boyle,* 499 F. Supp. 1147, 1170 (D.D.C. 1980) (quoting *Pettway v. American Cast Iron Pipe Co.,* 494 F.2d 211, 260 (5th Cir. 1974))), *cert. denied,* 471 U.S. 1115 (1985). In such a situation a court may, as the district court did in this case, award relief on a classwide, rather than individual, basis by calculating the number of positions for which class members should have been hired and distributing pro rata among all qualified class members the total amount of back pay for which the defendant may be held responsible. *E.g.,*

Hameed, 637 F.2d at 520-21; *see Catlett II,* 627 F. Supp. at 1019. This method of distribution does not contravene the mandate of *Firefighters Local Union No. 1784 v. Stotts,* 467 U.S. 561, 579-82 (1984), that make-whole relief be limited to actual victims of discrimination, because qualified members of the class certified by the court are presumptively victims of discrimination absent proof, which Missouri has not made in this case, to the contrary. *See Teamsters,* 431 U.S. at 361-62. We find no basis for disturbing the district court's determination to adopt a classwide back pay scheme. *See Segar,* 738 F.2d at 1290.

Missouri, however, argues the district court committed error in its execution of the classwide remedy by overestimating the number of female maintenance workers who would have been hired absent discrimination. The court relied on District Eight labor force statistics and the class' definition of the relevant work force to determine Missouri should have hired forty-six female maintenance workers during the class period. Eight females were hired, so the court calculated Missouri's total class back pay liability based on thirty-eight "female" positions. *See Catlett II,* 627 F. Supp. at 1019 (referring to labor pool definition in *Catlett I,* 589 F. Supp. at 933). Missouri argues the court in identifying the number of "female" positions instead should have relied on the percentage of maintenance applicants who were female.

This court has recognized that general population or labor force statistics in certain cases may be superior to applicant flow data for use in fashioning back pay remedies. *E.g., EEOC v. Rath Packing Co.,* 787 F.2d 318, 336-37 (8th Cir.), *cert. denied,* 107 S.Ct. 307 (1986). It was incumbent on Missouri to demonstrate that the district court in this case abused its discretion in relying on labor force data, *see id.* at 336, yet Missouri in attacking the calculation of thirty-eight positions merely revives in disguised form its statistical attempts to exculpate itself by arguing lack of female interest. In light of the court and jury

findings that Missouri engaged in disriminatory employment practices, we cannot accept a theory that would result in the denial of all back pay. *See Albemarle Paper Co. v. Moody,* 422 U.S. 405, 417-18 (1975).

Missouri is entitled to foreclose from sharing in the classwide back pay award individual class claimants who were not qualified for maintenance positions, and the district court granted the state's request to exclude from the recovery ten women who did not timely assert their abilities to operate lightweight motor equipment. *See Catlett II,* 627 F. Supp. at 1018. We find no basis for reversing the district court's decisions to retain in the class other females challenged by Missouri, and the state cannot now advance individual objections not included in its motion for summary judgment at the relief stage.

Plaintiffs Catlett, Tuter, Kallemyn, and Leembruggen may suggest that since they have lost their individual recoveries, they now should be allowed as class members to share in the classwide back pay award. The district court had no occasion to consider this argument, and it has not been fully briefed on appeal. Thus, we do not decide the question at this time. The district court may consider this issue if raised and disputed on remand (resolution in the plaintiff's favor, of course, would not increase Missouri's total back pay liability beyond the amount attributable to the thirty-eight "female" positions).

The district court's grant of a classwide hiring preference, however, raises different concerns than the classwide award of back pay, because the thirty-eight positions which should have gone to women cannot be so easily divided and distributed among the entire class. *Cf. Albemarle Paper Co.,* 422 U.S. at 416 (Title VII statutory scheme "implicitly recognizes that there may be cases calling for one remedy but not another"). The district court's hiring order potentially requires Missouri to give preference not to thirmy-eight women but to all of the more than 150 qualified class members among whom the back pay award

was split (approximately eighty members of the class have expressed continued interest in highway work). To the degree this hiring order benefits a greater number of females than would have been hired absent discrimination, the order exceeds a make-whole purpose and constitutes a form of affirmative relief we find unwarranted in this case under principles to be discussed *infra*. *See generally Berkman v. City of New York*, 705 F.2d 584, 595-97 (2d Cir. 1983).

Thus, on remand, the district court should either eliminate the hiring preference or limit it to thirty-eight positions to be allocated equitably among the interested and qualified class members. In either instance class members not receiving preferences will be entitled to reapply and receive full and fair consideration for maintenance positions.

IV.

Affirmative relief, in contrast to individual and classwide relief, serves "not to make identified victims whole, but rather to dismantle prior patterns of employment discrimination and to prevent discrimination in the future." *Local 28, Sheet Metal Workers' Int'l Ass'n v. EEOC*, 106 S.Ct. 3019, 3049 (1986) (plurality). Gender-conscious remedies benefiting individuals not identified as victims of the discrimination (e.g., members of the minority group outside the scope of the class) may be necessary for this purpose in some instances, as when an employer has engaged in persistent discrimination; however, affirmative action will not be an appropriate remedy in a majority of Title VII cases. *Id.* at 3050. A district court before exercising its discretion to order affirmative action should particularly consider the efficacy of alternate remedies. *Sheet Metal Workers*, 106 S.Ct. at 3050, 3053; *id.* at 3056 (Powell, J., concurring); *see United States v. Paradise*, 107 S.Ct. 1053, 1067 (1987) (plurality); *id.* at 1075 (Powell, J., concurring). In contrast, the district court in this case justified its establishment of hiring and applicant pool goals only with a reference to Missouri's "long history of discrimination and the comparative-

ly short history of attempts to end such discrimination." *See Catlett II,* 627 F. Supp. at 1020.

Supreme Court precedents illustrate the inadequacy of this justification. For example, in *Sheet Metal Workers, supra,* the defendant union initially had been found guilty of discrimination in a state administrative proceeding in 1964. The federal action had been instituted in 1971 after the union had flouted state administrative and judicial remedies, plus the union by the time affirmative action was decreed had twice been found in contempt of federal court remedial orders. Similarly, the affirmative remedy challenged in *Paradise, supra,* was imposed only when eleven years after the finding of discrimination the defendant employer still had not developed a suitable plan for making promotions. The Supreme Court in each instance emphasized that the lower court had mandated affirmative action only after the defendant had failed to live up to court-ordered commitments to eliminate discriminatory practices. *See Paradise,* 107 S.Ct. at 1066. Thus, the race-conscious remedies benefiting nonvictims were supported not only by the societal interest in eradicating discrimination, but also in the societal interests in ensuring compliance with court decrees and eliminating the ef- *Workers,* 106 S.Ct. at 3055 (Powell, Jr., concurring).

Applying these principles to the case before us, we cannot say Missouri has a "long history of 'foot-dragging resistance' to court orders" such that simply enjoining the state from further discrimination would clearly be futile. *See id.* at 3051. The Supreme Court has not yet approved a court-ordered race- or gender-conscious remedy against a defendant which has not been given a chance voluntarily to bring its personnel practices into compliance with a generalized injunction against further discrimination. We decline to take that step here.

Thus, we vacate those portions of the district court's order establishing a goal of thirty-seven to forty-eight percent female for Missouri's applicant pool and new maintenance hires. In addition, it will not be necessary for the district court to retain

jurisdiction to monitor compliance with its order, and Missouri will not be required to provide to the court the statistics set out in the court's appendix A. *See Catlett II,* 627 F. Supp. at 1021. Missouri, however, should maintain all applications, interview sheets, and related records in case further litigation becomes necessary.

The order imposing hiring goals shall be replaced by a generalized injunction prohibiting further discrimination by Missouri in hiring highway maintenance workers, and nothing in our opinion should be construed as diminishing Missouri's obligation to take effective, affirmative steps to publicize employment opportunities and manifest its receptiveness to female maintenance applicants. We particularly observe that the thirty-seven to forty-eight percent female goal selected by the district court reflects the jury's and the court's view of the evidence in this case and may prove a useful standard for Missouri in evaluating its own compliance with our injunction. Because we do not understand Missouri to challenge any other portions of the award of injunctive relief, we uphold the district court's remedial order in all aspects not mentioned.

V.

The class as a prevailing party is entitled to recover attorney fees. *See Hensley v. Eckerhart,* 461 U.S. 424, 429 (1983); 42 U.S.C. §§1988, 2000e-5(k). Calculation of the amount to be awarded begins with a determination of the hours reasonably expended on the matter plus an appropriate billing rate. *Hensley,* 461 U.S. at 433 & n.7. The district court here allowed all of the 4,658 hours claimed by class counsel and multiplied those hours by a billing rate varying from $50 per hour for time expended in 1978 up to $100 per hour for time expended in 1986. The court then enhanced this award by fifty percent, citing the "substantial risk" incurred by class counsel "in expending so many billable hours over a nine-year period" and the success of the class in securing hiring preferences and gender-conscious relief. Missouri on appeal argues only (1) that enhancement

based on success or risk of loss was inappropriate as a matter of law; and (2) that the district court committed error in failing to disallow those hours representing wheelspinning and duplication, those hours spent unsuccessfully pursuing the individual claims, and those hours spent unsuccessfully opposing Missouri's move to limit the class, which was originally certified statewide, to District Eight.

A district court, because of its "special understanding" of the degree of complexity of a case, is best equipped to determine the reasonableness of the hours expended by counsel, and an appeal on this issue will succeed only where the district court abused its discretion or committed error in implementing the controlling legal standards. *Moore v. City of Des Moines,* 766 F.2d 343, 345-46 (8th Cir. 1985), *cert. denied,* 106 S.Ct. 805 (1986). The fee award should not compensate counsel for those hours expended in pursuit of unsuccessful claims "distinct in all respects" from the successful claims. *Hensley,* 461 U.S. at 440. Where the hours expended are not easily allocable because the unsuccessful and successful claims were related, the court may merely reduce the award in its discretion to an amount reasonable in relation to the result on the merits, *id.* at 435, 440, but a plaintiff who has achieved substantial success should receive a fully compensatory fee despite the failure of the district court to adopt every contention raised. *Id.*

The class argues the district court properly included in the fee award attorney hours spent defending statewide class certification because the issue constituted an incidental contention that, despite its rejection, was reasonably raised in pursuit of the substantial success achieved on the discrimination claims. *Cf. Monroe v. United Air Lines,* 565 F. Supp. 274, 285-86 (N.D. Ill. 1983) (supplemental order) (unsuccessful motion for preliminary injunctive relief); *Easley v. Anheuser-Busch, Inc.,* 572 F. Supp. 402, 416 (E.D. Mo. 1983) (unsuccessful motion for partial summary judgment), *aff'd in part, rev'd in part on other grounds,* 758 F.2d 251 (8th Cir. 1985); *Bruno v. Western Elec.*

Co., 618 F. Supp. 398, 404 (D. Colo. 1985)) (unsuccessful motion to compel discovery); *Laffey v. Northwest Airlines*, 572 F. Supp. 354, 362 n.8, 364 & n.11 (D.D.C. 1983) (unsuccessful motion for revision of the postjudgment interest rate), *aff'd in part, rev'd in part on other grounds*, 746 F.2d 4 (D.C. Cir. 1984), *cert. denied*, 472 U.S. 1021 (1985).

Hensley, however, emphasizes the degree to which work on an unsuccessful claim may also be deemed to have been expended on the successful claim or claims. 461 U.S. at 435. While the district court's decision regarding the scope of the class necessarily took into consideration the facts and legal theories on which the District Eight action was based, the extra efforts expended in attempting to defend statewide certification did not in general contribute to the advancement of the District Eight claim, and attorney time spent studying hiring practices in other districts apparently was easily segregable, *see id.* The use at trial of a few pieces of evidence uncovered during statewide class discovery is insufficient to justify a fee award covering all of the approximately 643 attorney hours expended on non-District Eight matters. *See Webb v. County Bd. of Educ.*, 471 U.S. 234, 243 (1985). The statewide discovery was made not so much on behalf of the District Eight class in pursuit of its discrimination claims as on behalf of other female highway maintenance applicants throughout the state, and the non-District Eight women were not for the purposes of this litigation prevailing parties entitled to attorney fees. We conclude that attorney hours spent relative to statewide class certification should have been excluded from the fee award in this case. *See Bennett v. Central Tel. Co.*, 619 F. Supp. 640, 646-47 (N.D. Ill. 1985); *In re Mid-Atlantic Toyota Antitrust Litig.*, 605 F. Supp. 440, 447 (D. Md. 1984); *see also Richardson v. Restaurant Mktg. Assocs.*, 527 F. Supp. 690, 699 (N.D. Cal. 1981) (pre-*Hensley* case).

We also conclude, however, that fees were properly awarded for time spent pursuing the unsuccessful individual claims. A court should not disallow attorney hours related and necessary

to successful claims, *Carmichael v. Birmingham Saw Works,* 738 F.2d 1126, 1137 (11th Cir. 1984), and our discussion in section II, *supra,* explains the relevance to the class pattern or practice claim of evidence of individual incidents of discrimination. Furthermore, the district court did not abuse its discretion in failing to reduce attorney hours for inefficiency and duplication of services. We cannot find the hours claimed by the class excessive when, as illustrated by comments in the record, the pervasive documentary and statistical evidence and exhibits in this case created special burdens for the parties.

Class counsel's allowable and reasonably expended hours, if multiplied by a reasonable rate, presumptively resulted in an adequate fee award. *See Blum v. Stenson,* 465 U.S. 886, 897 (1984). Time and rate calculations reflect most factors relevant to attorney compensation, and absent a specific showing that an hours-times-rate "lodestar" amount is inadequate, a district court which enhances a fee award engages in impermissible double counting. *See id.* at 898-900. The class here did not present evidence that the success achieved through the litigation was not reflected in the lodestar factors. *See id.* at 900 & n.16. Nor did the class demonstrate that enhancement was necessary to attract competent local counsel in light of the risk of loss arising from the class' contingency fee arrangement. *See Pennsylvania v. Delaware Valley Citizens Council for Clean Air,* 107 S.Ct. 3078, 3089 (1987); *id.* at 3090-91 (O'Connor, J., concurring in part). Thus, the district court's enhancement of the class fee award may not be upheld on either ground challenged by Missouri.

The risk of losing the case, and thus the fee, however, must be distinguished from the loss a prevailing attorney experiences due to the delay in collecting the statutory fee award. *Id.* at 5115. A delay in the receipt of fee payment, because of inflation and lost interest, "dilutes the eventual award and may convert an otherwise reasonable fee into an unreasonably low one." *Johnson v. University College of the Univ. of Ala.,* 706 F.2d 1205, 1210-11

(11th Cir.), *cert. denied,* 464 U.S. 994 (1983). A fee award based on the rates in effect at the time attorney hours were expended ("historic rates") will not be fully compensatory unless the award accounts in some way for the loss due to delay in payment. *Daly v. Hill,* 790 F.2d 1071, 1081 (4th Cir. 1986). A court may account for this loss by enhancing the lodestar. *Id.*

The district court in this case used historic rates in calculating the lodestar award, and we believe the court, in its reference to the nine-year duration of this litigation, was basing its enhancement at least in part on the lost value of the fee due to delay in payment. The class argues that the fifty-percent enhancement may be justified totally on this basis. The average rate of about $71 per hour contemplated by the unenhanced award would have been entirely inadequate, *see Paxton v. Union Nat'l Bank,* 806 F.2d 785, 786 (8th Cir. 1986), and the average rate realized by class counsel after enhancement is still less than $110 per hour, a figure well in keeping with current market rates, *cf. Ramos v. Lamm,* 713 F.2d 546, 555 (10th Cir. 1983) (using current market rates as approximating historic rates adjusted for inflation and lost interest).

Shortly after the district court entered its fee order, however, the Supreme Court held a fee enhancement to compensate for delay in payment equivalent to an award of interest. *Library of Congress v. Shaw,* 106 S.Ct. 2957, 2965-66 (1986). Because interest is not available in suits against the United States absent "express congressional consent * * * separate from a general waiver of immunity to suit," *id.* at 2961, the Court disallowed an enhanced fee award made against the federal government under Title VII. At least one circuit has extended the "express waiver of interest" rule to eleventh amendment immunity, thus limiting the use of enhancements for delay in assessing attorney fees against states. *Rogers v. Okin,* 821 F.2d 22 (1st Cir. 1987). Furthermore, the district court here used a similar federal-state analogy in finding the eleventh amendment barred the class' recovery of prejudgment interest on the back pay award. *Catlett II,* 627 F. Supp. at 1019-20.

Because the parties have not yet briefed or argued immunity in the contest of fee enhancement or seriously explored the reach of *Shaw,* we remand to allow the district court to consider thoroughly this important question and make a comprehensive disposition of both the enhancement and prejudgment interest issues. Missouri has not waived any of its rights should immunity be found; the eleventh amendment may be raised at any time. *See Edelman v. Jordan,* 415 U.S. 651, 677-78 (1974); *Ford Motor Co. v. Department of Treasury,* 323 U.S. 459, 466-67 (1945); *Rose v. Nebraska,* 748 F.2d 1258, 1262 (8th Cir. 1984), *cert. denied,* 106 S.Ct. 61 (1985).

In sum, the district court on remand should eliminate from the fee calculation hours spent unsuccessfully defending statewide certification and should similarly adjust paralegal hours and other expenses included in the award. If the district court has counted certain taxable costs twice, this correction should be made. Enhancement will not be available if Missouri is protected under the eleventh amendment from awards of interest; however, if Missouri is not immune the district court in its discretion may enhance the class fee award to compensate for delay in payment. If Missouri is not immune the district court should also exercise its discretion regarding prejudgment interest on the back pay award. Missouri, in light of the intervening Supreme Court decision in *Crawford Fitting Co. v. J.T. Gibbons, Inc.,* 107 S.Ct. 2494 (1987), will be free to challenge the assessment against it of the class' expert witness fees.

We have carefully considered Missouri's additional challenges, for example, to the jury instructions and to the district court's conduct at trial, and we find no reversible error. We need not reach Missouri's argument regarding the failure of plaintiffs Tuter, Kallemyn, and Leembruggen to file complaints with the Equal Employment Opportunity Commission, *see* 42 U.S.C. §2000e-5(e), (f), because we reverse the individual judgments in favor of those plaintiffs. Also, we need not reach Missouri's argument that under the eleventh amendment the

Highway and Transportation Commission was not a proper party to the section 1983 actions; all relief awarded is supportable under Title VII and/or against proper section 1983 defendants. Missouri's argument regarding the absence at the remedial stage of any nonapplicant claimants mistakes the nature of the classwide award of relief and cannot justify a reduction in Missouri's total back pay liability; the identity of the class claimants does not change the number of positions which absent discrimination would have been filled by women. On cross-appeal we review the district court's class certification ruling for abuse of discretion, *see Shapiro v. Midwest Rubber Reclaiming Co.*, 626 F.2d 63, 71 (8th Cir. 1980), *cert. denied*, 449 U.S. 1079 (1981), and we find no abuse in the denial of a statewide class here.

We affirm the Title VII and section 1983 judgments in favor of the class, affirm the section 1983 judgments against the individual plaintiffs, reverse the Title VII judgments in favor of the individual plaintiffs, and remand to the district court for further proceedings consistent with this opinion.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

No. 78-4061-CV-C-5

Jane Catlett, Patricia Leembruggen, Grace Tuter
and Adeline Kallemyn, individually and on behalf
of all others similarly situated,

Plaintiffs,

vs.

Missouri Highway and Transportation
Commission, et al.,

Defendants.

ORDER AND MEMORANDUM

(Filed Dec. 5, 1983)

I. Introduction

Plaintiffs have filed a class action sex discrimination suit against the Missouri Highway and Transportation Commission (hereafter "Highway Commission") pursuant to 42 U.S.C. § 1983 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* The representative plaintiffs, Jane Catlett, Patricia Leembruggen, Grace Tuter and Adeline Kallemyn, allege as individuals and on behalf of the class that the Highway Commission failed and refused to hire women for the position of maintenanceman on the basis of gender, established and maintained job classifications which resulted in the exclusion of women, maintained a policy and practice of recruitment which had the effect of denying job opportunities to qualified female applicants, and refused to implement objective guidelines to correct the alleged discriminatory practices.

The remedies sought by the plaintiffs include damages for back wages and lost benefits of employment, as well as

declaratory and injunctive relief. On April 26, 1982, pursuant to F.R.C.P. 42(a), the Court ordered that the suit be severed into separate trials on the issues of (a) liability and (b) prospective equitable relief, monetary damages and attorneys' fees. By order dated August 9, 1982, the Court certified the class to encompass all women who applied or who might have applied for a maintenance position in District Eight of the Highway Commission between January 1, 1975 and the last day of May, 1980.

Plaintiffs' cause of action under 42 U.S.C. § 1983 was brought against the Highway Commission, Robert N. Hunter in his official capacity as Chief Engineer of the Highway Commission, and V.B. Unsell, in his official capacity as the District Engineer for District Eight of the Highway Commission. The trial of this case commenced on September 15, 1983 and concluded on September 23, 1983. On the § 1983 claims, the jury returned verdicts in favor of the class and against the Commission, Hunter, and Unsell, and returned verdicts for the defendants on the individual § 1983 claims of the four named plaintiffs.

On the Title VII claim, the Court, having heard the testimony at trial and having reviewed the voluminous exhibits submitted by the parties, has concluded for the reasons discussed below that the Highway Commission, through its recruitment and hiring policies, engaged in a pattern and practice of sex-based employment discrimination against the class. The Court also finds that plaintiff Jane Catlett was denied employment opportunities by the Highway Commission because of her sex in violation of Title VII.

FINDINGS OF FACT

1. Named plaintiffs Jane Catlett, Grace Tuter, Adeline Kallemyn and Patricia Leembruggen are female citizens of the United States and resided in the Western District of Missouri at all times relevant to this suit.

2. The defendant Missouri Highway & Transportation Commission is an agency of the State of Missouri organized and existing under the laws of the State of Missouri and is an employer within the meaning of Title VII of the Civil Rights Act of 1964. Its headquarters and central personnel division are located in Jefferson City, Missouri. The Commission is the agency responsible for the maintenance and upkeep of the roads in the State of Missouri. On January 1, 1980, the Missouri State Highway Commission merged with the Missouri Department of Transportation to become the Missouri Highway & Transportation Commission. The Missouri Highway & Transportation Commission is divided geographically into ten districts which are composed of counties and the City of St. Louis.

3. District Eight of the Highway Commission is headquartered in Springfield, Missouri, and consists of the Missouri counties of Christian, Dallas, Greene, Hickory, Laclede, Phelps, Polk, Pulaski, Stone, Taney and Webster.

4. Each of the ten districts of the Missouri Highway and Transportation Commission is headed by a District Engineer and each district has a Maintenance and Traffic Division which is headed by a District Maintenance and Traffic Engineer.

5. The job which is the subject matter of this action is the "maintenanceman" position, which is under the Maintenance & Traffic Division. The Maintenance & Traffic Division is responsible for the upkeep of the 32,000-mile highway system of the State of Missouri and conducts traffic studies of operational improvements to the highway system. The Maintenance & Traffic Division has the largest number of employees of any division and the maintenanceman job is the single largest job category in the Highway Commission. The Highway Commission considered the maintenanceman position to be an unskilled or semiskilled position.

6. The maintenanceman job is the entry level position within the Maintenance and Traffic Division, requiring no prior ex-

perience with the Highway Department before initial hire. It is the largest single job category in the Missouri Highway & Transportation Commission. The basic requirements for initial hire into the maintenanceman job are that the person have at least an eighth-grade education and an ability to operate lightweight motor equipment such as pickup trucks, tractors or mowers. The maintenanceman job consists of a variety of low skilled or semi-skilled duties such as mowing the right-of-way, plowing snow off the roads in the winter, filling potholes, maintaining buildings and rest areas, and performing minor maintenance tasks on equipment.

7. Plaintiff Jane Catlett filed a charge of discrimination with the Missouri Commission on Human Rights on July 21, 1975, and a similar charge with the Equal Employment Opportunity Commission on March 20, 1976, alleging that the Highway Commission failed to hire her for a maintenanceman position because of her sex. On December 15, 1976, the Highway Commission received a notice from the Equal Employment Opportunity Commission of Catlett's charge of discrimination. Catlett received a "notice of right to sue" letter from the United States Department of Justice on December 6, 1977. Plaintiff Catlett filed this lawsuit on March 3, 1978, within ninety days of the receipt of her notice of right to sue.

8. Federal jurisdiction is invoked pursuant to 28 U.S.C. § 1331, 28 U.S.C. § 1343, 28 U.S.C. §§ 2201 and 2202, and 42 U.S.C. § 2000(e) et seq.

9. Jane Catlett was the only plaintiff to file a charge of discrimination with either a state or federal agency. Individual plaintiffs Kallemyn, Tuter and Leembruggen failed to file any discrimination charge with any state or federal agency.

Recruitment Process for the Maintenanceman Job

10. The Highway Department in District Eight relied primarily on word-of-mouth recruitment for the jobs of maintenance-

man from January 1, 1975 through May 31, 1980. Occasionally, the Highway Commission in District Eight would notify the Missouri Division of Employment Security of job vacancies in the Maintenanceman position, but most job applicants applied directly to the Highway Commission by walk-in application.

11. The Highway Commission in District Eight did not advertise in the news media for applicants for the maintenanceman position from January 1, 1975 through May 31, 1980.

12. The maintenanceman work force in District Eight was all male until December, 1976, when the first female was hired by the Commission.

13. For purposes of evaluating the impact of the Highway Commission's recruitment procedures in District Eight, a moderate definition of the applicant pool to which the actual number of applicants could be compared is that group of persons who reside within the eleven counties of District Eight and who are in the civilian labor force as defined by the United States Census for 1970 and for 1980 in the job categories of sales, blue collar, farm, service and clerical, but excluding managerial, technical and professional workers, and who are between the ages of eighteen and seventy years and who have a driver's license and an eighth-grade education.

14. A more conservative definition of the applicant pool for District Eight would be that group of persons who reside within the eleven counties of District Eight and who are in the civilian labor force as defined by the United States Census for 1970 and for 1980 in all job categories except managerial, technical, professional and clerical workers and who are between the ages of eighteen and seventy years and who have a driver's license and an eighth-grade education.

15. The available applicant pool in District Eight can be estimated for each year between 1970 and 1980 by adjusting the census data on a straight line method so as to allocate the dif-

ference in the numbers in the census data between 1970 and 1980 equally in each year. The percentages of women in the relevant labor pool under the moderate definition ranged from 42% in 1970 to 48% in 1980 and under the conservative definition ranged from 32% in 1970 to 37% in 1980.

16. In District Eight, the following numbers of males and females were hired during the relevant time period for the maintenanceman position.

	Males Hired	Females Hired
1975	8	0
1976	2	1
1977	21	2
1978	21	5
1979	16	0
1980 (1/1-5/31)	2	0

17. The actual and expected number of female applicants for the maintenanceman position in District Eight, based on census data of the relevant applicant pool, and assuming a recruitment process which does not have an adverse impact on potential female applicants, is as follows:

	Female Applicants	Female Applicants Expected, Conservative Definition of Labor Force	Female Applicants Expected, Moderate Definition of Labor Force
1975	9	183	304
1976	16	234	304
1977	55	285	369
1978	120	326	424
1979	88	270	350
1980 (1/1-5/31)	24	103	133

The disparity in the actual number of females who applied for the maintenanceman jobs in District Eight compared to the number of expected female applicants based on the conservative and moderate definitions of the applicant pool was statistically significant.

18. In District Eight of the Highway Commission, the static maintenanceman workforce as of January 1st of each year was as follows:

		Expected No. of Female Workers		
	Males	Females	Conservative Definition	Moderate Definition
1975	198	0	69	90
1976	193	0	68	89
1977	192	0	69	90
1978	190	2	70	91
1979	189	6	72	93
1980	188	5	73	93

There was a statistically significant disparity in the number of women in the static workforce compared to the number of women in the available labor force in District Eight under both the conservative and moderate definitions in each year for 1975 through 1980.

19. The actual number of females hired in District Eight for the maintenanceman position compared to the number of females expected to be hired under the conservative and moderate definitions of the labor force is as follows:

	Total Hires	Females Hired	Expected Hires, Conservative Definition	Expected Hires, Moderate Definition
1975	8	0	3	4
1976	22	1	8	10
1977	23	2	8	11
1978	26	5	9	12
1979	16	0	6	8

For the years 1976 through 1979, there is a statistically significant difference between the number of women hired for maintenanceman positions in District Eight and the number of women expected to be hired under the conservative and moderate definitions of the labor force.

20. Of the 89 males who were hired for the maintenanceman position in District Eight during the relevant time period, 29 of them either listed on their applications references who were employees of the Highway Commission, or had interview sheets which reflected that they were known by Highway Commission employees.

21. After the Highway Commission began hiring women for maintenanceman positions on December 1, 1976, the number of

women applying for the position in subsequent years increased substantially.

22. The females listed on Plaintiff's Exhibit 421 filed applications for maintenanceman positions in District Eight between January 1, 1975 and May 31, 1980 and were not hired for entry maintenanceman jobs. These female applicants are members of the class except for those who have requested to be excluded from the class according to the court records.

23. All of the male applicants listed on Plaintiff's Exhibit 408 were hired for entry maintenanceman jobs in District Eight between January 1, 1975 and May 31, 1980, and at the time they were hired there were qualified female applicants, with the exception of two hires on February 1, 1975.

24. In December of 1976, Chief Engineer Robert N. Hunter issued a directive to all District Engineers to the effect that the Department's traditional methods of recruitment must no longer be relied upon to recruit female and minority applicants, and that advertising should be undertaken to increase the number of female and minority applicants. Hunter directed that local population statistics should be used as a guide in recruitment efforts. Neither Hunter nor the District Engineer in District Eight, V. B. Unsell, however, followed through or implemented this directive nor took any meaningful steps to increase the number of female applicants. Despite the directive, there were no advertisements in the media for the maintenanceman openings, nor were efforts made to contact women's groups in the community to advise the public of the Highway Commission's willingness to hire women as maintenancemen in District Eight.

Application Procedures of the Highway Commission

25. All written personnel policies were centrally formulated at the Highway Commission headquarters in Jefferson City, under the supervision of Chief Engineer Robert N. Hunter. Im-

plementation of these personnel policies was overseen by the central headquarters in Jefferson City under the supervision of Robert Hunter, and Hunter had final responsibility to approve personnel policies, subject to the approval of the Missouri Highway & Transportation Commission. A Personnel Committee appointed by Hunter adopted personnel policies, including hiring and recruitment policies to be included in the Personnel Management Manual, which is disseminated to each District.

26. All recommendations for hire for maintenanceman must be approved by Chief Engineer Robert Hunter in the central office. Only the Chief Engineer Robert N. Hunter has the authority to hire. In each district of the Highway Commission the selection of an applicant for hire into any job position must be approved by the Maintenance & Traffic Engineer and then by the District Engineer before the recommendation is sent to Jefferson City for approval. The central office in Jefferson City maintains a personnel file on each employee of the Highway Department which includes a copy of the employee's application form. The Central Personnel Office also maintained a list of all females ever employed in the maintenanceman positions.

27. Robert Hunter personally noticed every recommendation to employ a female for maintenanceman that came across his desk because of the few number of women who had been recommended for hire.

28. District Eight used the uniform application for employment form known as the P-1 form which all applicants must file with the Department to be considered for any job with the Department. The centrally developed and uniformly disseminated Job Interview Evaluation Form (Form P-20) has been used in District Eight since January, 1977.

29. Effective June 1, 1980, the central headquarters imposed upon all districts a uniform hiring freeze prohibiting any new hires for maintenanceman positions. This freeze has since been lifted.

30. For each vacancy, the Personnel Division of the Missouri Highway & Transportation Commission assures itself that there is an authorized slot. Only the Highway Commission headquarters has the authority to authorize the filling of job vacancies for the various job categories, including maintenanceman.

31. The Missouri Highway & Transportation Commission Form P-1, titled Application for Employment, is the standard application for employment used for entry maintenanceman positions in District Eight and has been since January 1, 1974.

32. Form P-1, Application for Employment, is completed and signed by all persons seeking employment with the Highway Commission pursuant to Policy 5000 of the Personnel Management Manual of the Missouri Highway & Transportation Commission. In District Eight after January 1, 1977, it was standard procedure for a P-20 interview form to be completed and to be attached to the applicant's application form.

33. The completed P-1 application forms are reviewed by employees of the Commission in the regular course of business and are retained in the District office.

34. The completed P-1 forms are retained as active applications for one year from the date on the application form pursuant to Policy 5000 of the Personnel Management Manual of the Highway Commission. Consequently, an applicant for maintenanceman is eligible to be considered for all vacancies which occur within one year after the application is filed. All applications for employment with the Highway Commission are deemed inactive one year after the date the application is filed with the Commission unless the applicant updates the application for employment.

35. Most persons interested in maintenanceman positions contacted the Highway Commission directly rather than the Division of Employment Security.

36. As a result of the Highway Commission's failure to hire women, potential female applicants were discouraged from ap-

plying for the maintenanceman position. Moreover, there was at least one instance where Highway Commission employees tried to discourage a female applicant by incorrectly advising her that the application could be obtained only in Springfield or Jefferson City, rather than at the maintenance shops near the applicant's home.

Hiring Process for the Maintenanceman Position

37. There were no females hired in District Eight for the maintenanceman position until after Jane Catlett filed her charge of discrimination with the Equal Employment Opportunity Commission.

38. In District Eight of the Highway Commission, the maintenance foremen, maintenance area supervisors, and the maintenance superintendents screen, evaluate, and recommend for hire applicants for the maintenanceman position. During the relevant time period, all the persons occupying these job categories were male. No written or verbal guidelines on hiring procedure were communicated to the Highway Commission employees in District Eight who had authority to screen, interview, or recommend applicants for employment into the maintenanceman position. In the absence of effective guidelines, the persons charged with such authority were free to exercise their unrestricted discretion in screening and evaluating applicants for hire. As a result, the process of screening applications to select applicants to be interviewed for the maintenanceman position was arbitrary, subjective, and inconsistent.

39. Following the employment interviews, the foremen and area supervisors recommend an individual for hire to the Maintenance Superintendent, who then makes a recommendation to the District Maintenance and Traffic Engineer. The Maintenance and Traffic Engineer makes the recommendation to the District Engineer who gives final approval and then forwards the recommendation to the central office in Jefferson

City. The Chief Engineer must sign off on all recommendations and has actual notice as to the sex of the new hires for the maintenanceman position.

40. One of the qualifications for the position of maintenanceman is the ability to operate lighweight motor equipment. The application form used by District Eight employees to evaluate applicants, however, did not request that the applicant indicate relevant experience involving lightweight motor equipment. although the application requested information concerning the applicant's past employment record and gave the applicant the opportunity to indicate training in areas such as carpentry, engine mechanics and heavy equipment operation, the application did not seek or provide the applicant with the opportunity to describe relevant experience acquired through non-paid farm and truck-driving experience. Numerous female applicants for the maintenanceman position had experience with lightweight motor equipment through non-paid or self-employed farm and trucking experience, but were not able to indicate this type of experience on the application form. Not all applicants for position of maintenanceman were interviewed for the position, however, as some applicants were screened on the basis of information contained on the application form, or on the basis of the personal knowledge of the selecting official regarding a particular applicant. As a result of the failure of the application form to provide a space for the listing of the unpaid experience or lightweight motor equipment experience, there was a reduced likelihood that these otherwise qualified female applicants would be selected for an interview.

41. The Highway Commission and District Eight did not provide the interviewers with training or instruction concerning the interview and selection process, and there were no written guidelines established to regulate the interview procedure. As a result, different hiring standards were applied to female applicants than were applied to male applicants. For example, in evaluating applicants for hire, interviewers in District Eight dis-

counted farm experience of female applicants, and yet relied on the same type farm experience in hiring male applicants. Similarly, the District Eight interviewers rated the work experience of female applicants as laborers, groundskeepers and road crew workers as unrelated to maintenance work, while males with similar experience were described by interviewers as having related experience.

In addition, distance requirements for the maintenanceman position were applied differently to females, as some female applicants who lived within twenty miles of a job vacancy were told that they did not live close enough for emergency duty, while some males who lived more than twenty miles from a vacancy location were interviewed and hired. Similarly, some highly qualified female applicants were not interviewed for vacancies near to where they lived, nor were they given an opportunity, unlike male applicants, to interview for vacancies for which they would have to move to be hired. Moreover, there were instances where District Eight officials interviewed female applicants who lived far from a job vacancy when there were active applications of females who lived close to the vacancy, and failed to interview the same women previously interviewed for vacancies near to where they lived.

Regarding those women who were interviewed, the interviewers discouraged several female applicants by asking questions in a manner indicating that the interviewers did not believe the applicant could handle the job, while the interviewers did not question male applicants in a similar manner. During the interviews, the interviewers repeatedly rejected the assertions of female applicants that they were willing and able to perform maintenanceman duties by making comments on the interview sheets such as "I am not sure that she would be satisfied although she strongly indicates that our work is what she is looking for," and "she applied for job as flagman and might not be happy with routine maintenanceman duties even though she admitted willingness to try." The interviewers, however, ac-

cepted similar assertions by male applicants without expressing similar reservations.

As a result of the unregulated interview process, several employment decisions were made in District Eight that give rise to an inference of gender based discrimination. For example, a male applicant with clerical experience and no other related experience was hired as a maintenance man, while a female applicant with clerical experience was rejected due to her lack of job experience and was encouraged to seek a clerical position. Similarly, a male applicant who lacked any type of experience with light motor equipment was hired as a maintenanceman in District Eight, while a female applicant with farm experience and who had operated a tractor and brush hog mower was considered for the same job but was not hired. A highly qualified female applicant was rejected ostensibly because of her frequent job changes, while males with more frequent job changes were hired as maintenancemen.

42. The employment interviews in District Eight for the maintenanceman position were conducted in settings which intimidated and discouraged female applicants, and were conducted in a manner to suggest that the female applicants were not seriously being considered for the jobs. There were numerous instances where District Eight interviewers emphasized the negative aspects of the maintenanceman position during the interview in order to discourage female applicants from pursuing their applications. The interviews of female applicants consistently included repeated references by the interviewers to the fact that one of the duties of the maintenanceman position was the removal of dead animals from the roads. The interviewers in District Eight also emphasized to the female applicants that there were no restroom facilities for women to use while the maintenance crews were on duty, and that the job required long hours and involved dangerous activities in inclement weather. The interviews of male applicants, however, did not include similar emphasis by the interviewers of the undesirable characteristics of the maintenanceman position.

In addition, there were several instances where the interviews of female applicants in District Eight were not conducted in private rooms normally used for interviewing, but were done in open areas with large numbers of highway employees present who would hear and react to the interview. This practice inhibited and intimidated the female applicants, and a similar procedure was not used in the interviews of male applicants in District Eight. There were also instances where the interviewers tried to discourage female applicants by suggesting that the applicant's husband would become jealous if the woman had to spend the night working on the road in emergencies with male maintenancemen, or by suggesting that the female applicant would be offended by the language of the male maintenancemen.

In a similar vein, female applicants for the maintenance positions in District Eight were reluctant to attend interviews because of telephone calls from interviewers who attempted to discourage the applicants by emphasizing the negative aspects of the job and by advising the applicants that another person was likely to be hired for the position. There were also instances where hiring officials in District Eight encouraged female applicants to pursue other jobs outside the Highway Commission.

The fact that female applicants in District Eight were not given serious consideration for employment is demonstrated by comments made by interviewers on the interview sheets regarding the physical attractiveness of female applicants, and by undue emphasis given by interviewers to the height and weight of female applicants in failing to hire them. Interviewers attempted to discourage female applicants by telling the applicants that they were not strong enough or built right for the job. One interviewer disqualified female applicants who were "too feminine." Although female applicants were rejected ostensibly because they were too light weight, fifteen of the male applicants hired in District Eight from January, 1975 through May 31, 1980 weighed between 110-160 pounds. Similarly, although

female applicants were rejected by District Eight because they were too small, fifteen of the male applicants hired in the relevant time period were between 5'5½'' tall and 5'8½'' tall.

43. Several female applicants testified at trial regarding their futile attempts to obtain employment as maintenanceman in District Eight. Patricia Leembruggen filed an application for employment with District Eight on March 25, 1975. Leembruggen was qualified for the maintenanceman position, as she was a high school graduate and had experience in operating lightweight motor equipment. Despite her qualifications, Leembruggen was not hired by District Eight, nor was she interviewed or even contacted for an interview. District Eight continued to accept employment applications for the maintenanceman position after Leembruggen filed her application for employment. The Highway Commission hired a male to begin employment as a maintenanceman on April 9, 1975, and hired ten males with qualifications similar to Leembruggen's during the year her application was active.

Similarly, Grace Tuter filed an application for employment with District Eight on June 14, 1976. Tuter was qualified for the maintenanceman position because she was a high school graduate at the time she applied for the position, and because Tuter had the ability to operate lightweight machinery as a result of her farm experience. Although Tuter was interviewed on October 15, 1976, she was not hired and was not considered for any maintenanceman vacancies subsequent to October 15, 1976. Twenty-seven males with qualifications similar to those of Tuter were hired during the year following Tuter's application for employment.

Adeline Kallemyn filed her application for employment with District Eight on September 27, 1976, and was qualified for the maintenanceman position because she was a high school graduate and had the ability to operate lightweight equipment. Although Kallemyn was interviewed for a maintenanceman vacancy on September 27, 1976, and again on June 22, 1977, she

was not hired. Numerous males, however, with qualifications similar to Kallemyn's were hired in District Eight for maintenanceman positions during the periods Kallemyn's application was active. During Kallemyn's interviews, interviewers focused on her appearance rather than her qualifications, downgraded Kalleymn's qualifications, and indicated that they did not believe she would be able to handle the undesirable aspects of the maintenanceman position.

On June 25, 1975, plaintiff Jane Catlett inquired at the Marshfield maintenance shed about a maintenanceman vacancy at the Conway Rest Area. Catlett was informed of this opening by the wife of James Coyle, who was a mechanic employed by District Eight. At this time, District Eight had never hired a female to fill a maintenanceman position. Catlett talked to Robert Meyer, the area supervisor for the Marshfield shed, and was given an employment application. Although Meyer advised Catlett that there was no need for her to complete the application that day, Catlett promptly completed the application and returned it to Meyer at the maintenance shed early in the morning of June 26, 1975. When she returned the application form, Catlett asked Meyer questions concerning the employment process, but Meyer acted annoyed and refused to discuss her application, except to say that she was qualified and would be considered for the position, and that she would be contacted by the Highway Commission's office in Springfield.

Despite Meyer's assurances, Catlett was not interviewed nor was she contacted by District Eight concerning the Conway Rest Area vacancy. Later in the morning of June 26, 1975, Meyer went to the District Eight offices in Springfield, informed William Day, the maintenance and traffic engineer for District Eight, that a female had applied for the vacancy, and recommended that a male applicant, Robert Strickland, be hired for the position. On June 30, 1975, V.B. Unsell, the District Engineer for District Eight, filed a requisition form with the Highway Commission requesting approval to hire Strickland.

This requisition was approved by Robert Hunter, Chief Engineer for the Highway Commission, on July 3, 1975, and Strickland began his employment on July 7, 1975.

Following the selection of Strickland, Meyer noted that Catlett had listed James Coyle as a reference in applying for the maintenanceman position. Thinking that Coyle had informed Catlett of the vacancy at the Conway Rest Area, Meyer became angry and confronted Coyle, telling Coyle that "you sent that bitch in here, and now I'm going to have to hire her."

The Highway Commission continued to accept applications for employment for entry maintenanceman positions after Catlett filed her application and, in addition to Robert Strickland, nine males were hired in District Eight into entry maintenanceman positions within one year after Catlett filed her initial application for employment. Catlett, however, was never hired for any position with the Highway Commission.

On March 20, 1976, Catlett filed a charge with the Equal Employment Opportunity Commission, alleging that the Highway Commission failed to hire her for a maintenanceman position because of her sex. The Highway Commission subsequently contacted Catlett and requested that she interview for a maintenanceman vacancy. Catlett attended the scheduled interview at the Marshfield shed on June 22, 1977. At the interview, the District Eight hiring officials attempted to discourage Catlett from wanting to work for the Commission by emphasizing the negative aspects of the maintenanceman position, and by their reluctance to discuss the positive features and benefits of the job. The interviewers made no attempt to determine Catlett's qualifications for employment. Pursuant to the request of the interviewers, Catlett verbally updated her prior application at the June 22 interview by describing her subsequent job experience, which included maintenance work at a restaurant and clerical work at a university. Catlett refused, however, to disclose the name of the university where she was employed, because she was afraid she would lose her job. Al-

though Catlett described the duties involved with her clerical work, the interviewers devoted the majority of the interview to expressing their disapproval of her failure to disclose the name of her employer, and warned Catlett that her refusal would be considered in the hiring decision. In addition, rather than being concerned with Catlett's ability to perform the duties required of the maintenanceman position, the comments of the interviewers on the interview sheet indicate that they were more concerned with what they perceived as flaws in Catlett's personal appearance. In June of 1978, at the request of the Highway Commission, Catlett submitted a written update of her original application.

Despite her apparent qualifications and her expressed interest in employment with the Highway Commission, Catlett was not hired by District Eight nor was she offered a job. During the period of time that Catlett's application for employment and supplements were active, there were more than thirty vacancies for the maintenanceman position in District Eight for which males were hired. Many of the males hired had qualifications similar or inferior to Catlett's qualifications. A review of the conduct of the hiring officials in District Eight regarding the handling of Catlett's application and interview, as well as their haste in hiring a male applicant immediately after Catlett submitted her initial application, clearly demonstrates that the refusal of the Commission to hire Catlett was based on her sex. This finding is further supported by the subsequent hiring decisions made by the Commission while Catlett's application was still active. Furthermore, there was no credible evidence presented at trial to support the Commission's contention that Catlett was not hired because she failed to update her application in a timely fashion, and that she was not hired because other applicants were better qualified.

II. CONCLUSIONS OF LAW

Under Title VII, there are two separate but related theories available to prove a prima facie case of employment discrimination: disparate treatment and disparate impact. Disparate treatment is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment. Undoubtedly, disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII." *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 335 n. 15, 97 S.Ct. 1843, 1854 n.15 (1977). In *McDonnell Douglas v. Green,* 411 U.S. 792, 93 S.Ct. 1817, the Supreme Court established the allocation of proof governing an individual's claim of disparate treatment. The plaintiff may establish a prima facie case of discrimination in hiring by showing (1) that she was a member of a protected class; (2) that she applied and was qualified for a job for which the employer was seeking applicants; (3) that she was rejected for the position despite her qualifications; and (4) that, after she was rejected, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. 411 U.S. at 802, 93 S.Ct. at 1824.

While the foregoing describes the general test to be applied in Title VII cases in determining whether plaintiff has established a prima facie case of discrimination, "[t]he method suggested in *McDonnell Douglas* for pursuing this inquiry was never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." *Furnco Construction Corp. v. Waters,* 438 U.S. 567, 577, 98 S.Ct. 2943, 2949 (1978). The courts have recognized that the *McDonnell Douglas* test of a prima facie case is not capable of a literal application in every Title VII case, and that the proof required to demonstrate a prima facie case will vary

with each factual situation. *Furnco Construction Corp. v. Waters, supra,* 438 U.S. at 575-76, 98 S.Ct. at 2949. Basically, the plaintiff is only required to "show actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were based on a discriminatory criterion illegal under the Act." *Kirby v. Colony Furniture Co.,* 613 F.2d 696, 703 (8th Cir. 1980), quoting from *Furnco Construction Corp. v. Waters, supra,* 438 U.S. at 576, 98 S.Ct. at 2949.

By making a prima facie case of disparate treatment, a plaintiff raises an inference of "discriminatory animus because experience has proved that in the absence of any other explanation it is more likely than not that those actions were bottomed on impermissible considerations." *Furnco Construction Co. v. Waters, supra,* 438 U.S. 567, 579-80, 98 S.Ct. 2943, 2951. The establishment of a prima facie case "creates a legally mandatory rebuttable presumption of discrimination." *Jones v. International Paper Company and United Paperworkers International Union,* No. 82-1896, slip op. at 7 (8th Cir., Nov. 3, 1983). A prima facie showing, however, is not the equivalent of a factual finding of discrimination. *Id.* at 759, 98 S.Ct. at 2951. "That is, the employer as a Title VII defendant does not have to prove absence of discriminatory motive to escape liability; a prima facie showing of disparate treatment shifts only the burden of producing evidence to the employer, not the burden of persuasion." *Kirby v. Colony Furniture Co., Inc., supra,* 613 F.2d 696 at 702. The evidentiary obligation of the defendant "is limited to a burden of production." *Jones, supra,* slip op. at 7. To dispel the adverse inference from a prima facie showing of disparate treatment, the employer need only articulate a legitimate, non-discriminatory reason for the plaintiff's treatment. *Id. Furnco Construction Co. v. United States, supra,* 438 U.S. at 577-78, 98 S.Ct. at 2950. If the employer does articulate a justification reasonably related to the achievement of a legitimate goal, the plaintiff must show that the defendant's articulated reason is a mere pretext for discrimination. *McDon-*

nell Douglas v. Green, supra, 411 U.S. at 804, 93 S.Ct. at 1825. The burden of persuasion remains on the plaintiff, who must convince the trier of fact by a preponderance of the evidence that the challenged employment practice is discriminatory. *Kirby v. Colony Furniture Co., Inc., supra,* 613 F.2d at 703.

In comparison, claims based on the disparate impact theory of employment discrimination involve employment practices that are "facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity." *International Brotherhood of Teamsters v. United States, supra,* 431 U.S. 324, 335-36 n. 15, 97 S.Ct. 1843, 1854 n. 15. To make a prima facie case on a disparate impact claim, a plaintiff need not show that the employer had a discriminatory intent but need only demonstrate that the particular practice results in a discriminatory effect. *Furnco Construction Co. v. Waters, supra,* 438 U.S. at 583, 98 S.Ct. at 2952-53 (Marshall, J. dissenting). The plaintiff need only show that an employment practice operates to exclude a protected class in order to make a prima facie case of discrimination under a disparate impact theory. *Jones, supra,* slip op at 5. Once a plaintiff has established the disparate impact, the burden shifts to the employer to demonstrate that the practice has a manifest relationship to the employment in question. *Kirby v. Colony Furniture Co., Inc., supra,* 613 F.2d 969, 703. If the employer proves that the challenged practices are justified by business necessity, the plaintiff may then demonstrate that other employment practices lacking a similar discriminatory effect would satisfy the employer's legitimate interest in efficient and trustworthy workmanship. *Id.*

Regarding claims of class-wide sex discrimination under Title VII, central to both the disparate treatment and disparate impact theories is the existence of "an identifiable employment pattern, practice or policy that demonstrably affects all members of a class in substantially, if not completely, com-

parable ways." *Stastny v. Southern Bell Telephone & Telegraph Co.*, 628 F.2d 267, 273 (4th Cir. 1980). Under the disparate treatment theory, "this is the pattern or practice, 'followed as an employer's regular or standard operating procedure,' which so demonstrably treats women in relatively unfavorable ways that justifies a rebuttable inference that it proceeds from an intention to treat them differently simply because of their sex." *Id. See Teamsters v. United States, supra,* 431 U.S. at 336, 97 S.Ct. at 1855. Under the disparate impact theory, it is the practice or policy which, "though demonstrably neutral or even benign in any sex-related intent, nevertheless bears with disproportionately adverse impact and without any justification of business necessity upon women." *Stastny v. Southern Bell, supra,* 628 F.2d at 273-74. *See Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849 (1971) To establish a class-wide pattern or practice of discrimination, a plaintiff must prove "more than the mere occurrence of isolated or 'accidental' or sporadic discriminatory acts." *International Brotherhood of Teamsters v. United States, supra,* 431 U.S. 324 at 336, 97 S.Ct. at 1855. The plaintiff must establish by a preponderance of the evidence that discrimination was the employer's standard operating procedure — the regular than the unusual practice. *Id.*

A. THE CLASS CLAIMS

Statistical Evidence and the Prima Facie Case

Statistical evidence can serve as a useful tool in pattern and practice suits in the determination of whether defendants have engaged in employment discrimination. *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 97 S.Ct. 1843 (1977). A plaintiff can utilize statistics to establish a prima facie case of disparate impact discrimination. *Royal v. Missouri Highway and Transportation Commission,* 655 F.2d 159, 162 (8th Cir. 1981). Statistical evidence also is relevant to a claim of disparate treatment, and statistics showing a general pattern of

discrimination are probative on the question of whether the reasons given for a particular action are pretextual. *Bauer v. Bailar,* 647 F.2d 1037, 1045 (10th Cir. 1981). The significance of statistical evidence in a given case depends on the surrounding facts and circumstances. *International Brotherhood of Teamsters v. United States, supra,* 431 U.S. at 340, 97 S.Ct. at 1856.

In *Green v. Missouri Pacific Railroad,* 523 F.2d 1290 (8th Cir. 1975), the Eighth Circuit identified three statistical methods of showing a disproportionate impact on minorities. The first procedure considers whether a minority as a class is excluded by the employment practice in question at a substantially higher rate. *Id.* at 1293. The second procedure involves the use of actual applicant data, comparing the percentage of minority and non-minority applicants actually excluded by challenged employment practice. *Id.* at 1294. The third procedure examines the level of minority employment by the employer in comparison to the percentage of minorities in the relevant geographic area. *Id.*

The statistical evidence presented in this case clearly establishes a prima facie case of employment discrimination. The plaintiffs' theory that the Highway Commission's word-of-mouth recruiting practices produced an abnormally small pool of female applicants is supported by the fact that there was a gross and statistically significant disparity between the number of women who actually applied for maintenanceman positions and the number of female applicants expected under the moderate and conservative definitions of the labor pool. Similarly, the plaintiffs' contention that the unregulated hiring procedure and the often hostile interview process resulted in the denial of employment opportunities to female applicants on account of their sex is illustrated by the statistically significant difference between the number of women hired for maintenanceman positions and the number of females expected to be hired, and by the disparity that existed in the static workforce. In ad-

dition, an examination of the number of males hired in each year compared to the number of females hired supports the conclusion that District Eight engaged in discriminatory employment practices. Although the Highway Commission's Chief Engineer issued a directive on the subject of minority employment in December, 1976, District Eight hired only two women out of fifty-five female applicants in 1977. Although there were 190 males and only two women employed as maintenancemen as of January 1, 1978, District Eight hired only five of the 120 females who applied during that year. In 1979, when six women were employed as maintenancemen at the start of the year, District Eight failed to hire any of the 88 women who applied.

Moreover, the statistical evidence also provides support for the plaintiffs' theory that the number of female applicants was lower due to the word-of-mouth recruiting practices of the Highway Commission. In 1975, when no women had been employed as maintenancemen by District Eight, there were only nine female applicants. In 1976, when the first female was hired as a maintenanceman by District Eight, the number of female applicants rose to sixteen. In 1977, two more women were hired, and 55 females applied in District Eight. Similarly, in 1978, the number of women hired in District Eight reached a high of five, and the number of female applicants rose to its highest level at 120. In 1979, no females were hired in District Eight, and correspondingly, the number of female applicants dropped to 88. This parallel relationship between the number of women who were hired each year and the number of females who applied in the same year provides persuasive statistical support for the plaintiffs' contention that the word-of-mouth recruiting practiced by District Eight had an adverse effect on the number of women who applied and were hired for the maintenanceman position.

In rebuttal, the Highway Commission argues that there was no disparate impact because the Commission hired 2.6% of the female applicants between January 1, 1975 and May 31, 1980,

while it hired only 2.5% of the male applicants during the same period. This argument is flawed, however, as it assumes that the applicant pool was not influenced by the Commission's recruitment and hiring process. A statistical showing of disproportionate impact need not be based on an analysis of the actual applicants, because "the application process itself might not adequately reflect the actual potential applicant pool, since otherwise qualified people might be discouraged from applying because of a self-recognized inability to meet the very standards challenged as being discriminatory." *Dothard v. Rawlinson,* 433 U.S. 321, 330, 97 S.Ct. 2720, 2727 (1977). *See also Donnell v. General Motors Corp.,* 576 F.2d 1292, 1298 (8th Cir. 1978). Even though the actual applicant data would indicate that there was no disproportionate impact, general population data (the first and third methods described in *Green*) can provide a basis for a showing of disproportionate impact. *Hammeed v. Intern. Ass'n of Bridge, Etc.,* 637 F.2d 506, 512 n. 6 (8th Cir. 1980). "This is particularly the case where there is some threat to the validity of the actual applicant data." *Id.* In this case, the actual applicant data was affected by the Commission's hiring practices, and accordingly, the statistical evidence presented by the plaintiffs establishes at the very least a prima facie case of disparate impact.

Although a prima facie showing may in the proper case be made by statistics alone, it may also be established by a cumulation of evidence, including patterns, practices, general policies or specific instances of discrimination. *Equal Employment Opportunity Commission v. American National Bank,* 652 F.2d 1176, 1188 (4th Cir. 1981). In this case, the Court is satisfied that the plaintiffs have met their burden of establishing a prima facie case on statistics alone, as the plaintiffs have shown that women not only were hired in District Eight in disproportionate numbers, but also that they applied in similarly disproportionate numbers. This is not, however, a case based solely on statistics. In addition to a substantial and convincing amount of relevant statistical evidence, plaintiffs have enhanced these

statistics with direct evidence that the hiring officials in District Eight intentionally discriminated against women as part of a regular pattern and practice. This evidence includes the consistent use of interviews by hiring officials to discourage and intimidate female applicants, the refusal on the part of the Highway Commission to promulgate objective guidelines to correct a hiring process that was known by the Commission to be discriminatory, and the purposeful failure on the part of the Commission to change its word-of-mouth recruiting policy that generated a disproportionately low number of female applicants. This evidence of discriminatory intent removes any question that the disparities established by the statistics arose merely as a matter of chance.

The Interviews of Female Applicants

Title VII requires that females must have equal employment opportunities, not merely that their applications, if any, be processed fairly. Internal employment practices which deny equal employment opportunity for women are in violation of Title VII. *Harless v. Duck,* 619 F.2d 611, 618 (6th Cir. 1980). Discriminatory intent in the interview process may be shown by the interviewer's failure to give a female applicant serious consideration, and by interview questions which do not relate to a bona fide occupational qualification. *King v. N.H. Dept. of Resources & Economic Development,* 562 F.2d 80, 82-83 (1st Cir. 1977).

In District Eight, the employment interviews for the maintenanceman position consistently were conducted in a manner designed to discourage and intimidate female applicants. The interviewers of female applicants regularly emphasized the negative aspects of the job by repeatedly referring to the fact that maintenancemen must remove dead animals from the road, and to the fact that there are no restroom facilities available while the maintenance crews are on the road. In addition, the interviewers often conducted the interviews in a manner indicating they did not believe the female applicant

could perform the duties required of maintenancemen, and often rejected the assertions of female applicants that they were willing and able to perform the duties required. Unlike the male applicants, who generally were interviewed in private rooms at the maintenance sheds, several female applicants were forced to take part in interviews conducted in open areas with numerous highway employees present, a practice which was designed to inhibit and intimidate the female applicants. The fact that these discussions and practices did not occur in the interviews of male applicants clearly demonstrates that the female applicants were not given serious consideration for employment.

These incidents occurred with such frequency in the interview process that there can be no doubt that it was the regular practice of the Highway Commission in District Eight to intentionally discriminate against female applicants. Accordingly, the plaintiffs clearly have made a prima facie showing of disparate treatment as a result of the interview process. In response to this showing, the Highway Commission has not articulated any legitimate reason justifying these interview practices. Instead, the Highway Commission merely denies that these practices ever occurred. This Court finds that the defendant has not rebutted the plaintiff's prima facie case of disparate treatment, and that in any event, even if such rebuttal evidence exists, the plaintiffs have established by a preponderance of the evidence that the employment interviews of female applicants by District Eight constituted a pattern and practice of intentional discrimination which denied the plaintiff's employment opportunities on account of their sex.

The Unregulated Hiring Process

In *Stewart v. General Motors Corp.*, 542 F.2d 445 (7th Cir. 1976), the Fifth Circuit ruled that a promotion system which operated to exclude blacks was in violation of Title VII, and noted that the system was highly susceptible to abuse because supervisory recommendations played an important role in the promotion process. The Court observed that no written guide-

lines were established to delineate relevant criteria for promotion, and that the foreman who had to make the recommendations, most of whom were white, had no objective way of evaluating the employees. The Court in *Stewart* felt that such a process which totally lacked objective standards "could only reinforce the prejudices, unconscious or not, which Congress in Title VII sought to eradicate as a basis for employment." *Id.* at 450. Similarly, in *United States v. Hazelwood School District,* 534 F.2d 805 (8th Cir. 1976), the Eighth Circuit held that a prima facie case of a pattern or practice of employment discrimination existed where there was statistical evidence showing a disparity between the proportion of blacks in an employer's workforce and the relevant labor market, and where the employer's hiring procedures involved the use of vague and subjective criteria. *Id.* at 813. The lack of objective guidelines for hiring and promotion and the failure to post notices of job vacancies are badges of discrimination. *Brown v. Gaston County Dyeing Machine Co.,* 457 F.2d 1377, 1383 (4th Cir. 1972). Likewise, in *Rowe v. General Motors,* 457 F.2d 348 (5th Cir. 1972), a promotion system was found to be in violation of Title VII because it contained the following features: (1) the foreman's recommendation was an indispensable factor in the promotion process; (2) the foremen were given no written instructions pertaining to the qualifications necessary for promotion; (3) the standards which were controlling were vague and subjective; and (4) there were no safeguards in the procedure designed to avert discriminatory practices. *Id.* at 358-59.

In the present case, the unregulated interview process used by the Highway Commission in District Eight was highly susceptible to discriminatory hiring decisions. In District Eight, the recommendations of the maintenance foreman, area supervisors and superintendents played a critical role in the hiring decisions. No effective written or verbal guidelines on hiring procedure were established by the Highway Commission or by District Eight, and as a result, the interviewers had no objective criteria to delineate the factors relevant to the hiring decision. The in-

terviewers, all of whom were male, were free to exercise their unlimited discretion in evaluating applicants for hire. Even the application form used by District Eight was insufficient, as it failed to provide the interviewers with relevant information concerning the applicant's ability to operate lightweight motor equipment, which was one of the necessary qualifications for the maintenanceman position.

Due to the absence of guidelines to regulate the selection process, the hiring decisions in District Eight were arbitrary and subjective, and as a result, hiring standards that were applied to female applicants were not the same as those applied to males. For example, the interviewers discounted the farm and labor experience of some female applicants, while male applicants with similar experience were considered to be qualified by the interviewers. Similarly, the requirement that prospective employees live within twenty miles of the maintenance shed was applied more strictly to female applicants. Likewise, a female applicant's lack of size often was considered by the interviewers to be a reason not to hire, while males of similar size were hired by the Commission. One of the most damaging results of the unregulated hiring process clearly was the practice of using the interviews to discourage female applicants.

Highly probative evidence of the intentional discrimination by the Commission is the fact that as early as 1976, both the Commission and District Eight were aware of the urgent need to avoid discriminatory hiring practices regarding female applicants. Although the Commission was aware of this responsibility, and cognizant of the lack of female employees in District Eight, it took no steps in insure that the requirements of Title VII were obeyed, and knowingly failed to promulgate any guidelines to regulate the hiring process.

In *Harris v. Ford Motor Co.*, 651 F.2d 609 (8th Cir. 1981), the Eighth Circuit recognized that a subjective system of evaluation cannot alone form the foundation for a discriminatory impact case. *Id.* at 611. The Court in *Harris* also recognized,

however, that a non-objective evaluation system may be probative of intentional discrimination, especially when discriminatory patterns result, "because such systems operate to conceal actual bias in decisionmaking." *Id.* Similarly, the Eighth Circuit has recognized that "a case of disparate treatment may be proven where employment decisions are made by supervisors subjectively without definite standards for review, and the decisions resulting in a pattern disfavoring minorities or females." *Satz v. ITT Financial Corp.*, 619 F.2d 738, 746 (8th Cir. 1980).

In light of the evidence demonstrating a pattern of discrimination against female applicants in District Eight, this Court finds that the Commission's knowledge that the promulgation of guidelines was necessary to avoid discriminatory results, coupled with its failure to regulate the hiring process in District Eight, constituted a prima facie showing of intentional employment discrimination. The Commission has not rebutted the plaintiffs' prima facie showing, as it has not articulated any legitimate reason justifying the unregulated hiring process. Moreover, even if such a reason were articulated by the Commission, the Court concludes that the plaintiffs have established by a preponderance of the evidence that the unregulated hiring process used by District Eight constituted a pattern and practice of intentional discrimination which denied the plaintiff's employment opportunities on account of their sex.

Word-of-Mouth Recruiting

Although it is clearly established that Title VII does not require that an employer give preferential treatment to minorities or women or that an employer restructure his hiring practices to maximize the number of minorities and women hired, *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 259, 101 S.Ct. 1089, 1096-97 (1981), evidence of intentional discrimination may be based upon a history of minimal recruiting efforts in publicizing job vacancies and openings. *Rogers v. International Paper Co.*, 510 F.2d 1340, 1345 (8th Cir. 1975). "The

passive nature of past recruitment together with the failure to undertake affirmative recruitment efforts after the passage of Title VII may justify a finding of discriminatory conduct." *Id.* The practice of word-of-mouth recruiting, where employment depends primarily upon being referred to the company by an existing employee, has been determined to operate in a discriminatory manner against blacks. *Parham v. Southwestern Bell Telephone Co.*, 433 F.2d 421, 427 (8th Cir. 1970). In *Parham,* the Eighth Circuit stated that where an employer's work force is almost completely white, "it is hardly surprising that such a system of recruitment produced few, if any, black applicants. As might be expected, existing white employees tended to recommend their own relatives, friends and neighbors, who would likely be of the same race." *Id. See also United States v. N.L. Industries, Inc.*, 479 F.2d 354, 368 (8th Cir. 1973). Although word-of-mouth recruitment is a practice that may be neutral on its face, the procedure often operates adversely against minorities, and is not often justified by business necessity. *United States v. Georgia Power Company,* 474 F.2d 906, 925 (5th Cir. 1973).

In the present case, nearly all of the hiring of maintenancemen in District Eight resulted from word-of-mouth recruiting. Although the Highway Commission was aware that few women were applying in District Eight, the Commission made no effort to publicize job vacancies. The statistical evidence supports the plaintiffs' theory that the word-of-mouth recruiting had an adverse effect on the number of female applicants, as the number of females who applied increased as the number of female hires increased, and the number of female applicants decreased when the number of females hired decreased. As was similarly noted by the Eighth Circuit in *Parham,* it is not surprising that this type of recruitment produces few female applicants, as it should be expected that the male employees in District Eight usually would inform only their male relatives and friends of the maintenanceman vacancies. Accordingly, the Court finds that the word-of-mouth recruiting process used by

District Eight as its standard operating procedure, although neutral on its face, resulted in a disproportionate effect on the number of females who applied and who were hired. The Highway Commission has presented no evidence, nor does it contend, that this practice has a manifest relationship to employment. Furthermore, the Court concludes that the plaintiffs have clearly established that the word-of-mouth recruiting of District Eight constituted a pattern and practice of employment discrimination which had an adverse impact on the plaintiffs.

B. THE INDIVIDUAL PLAINTIFFS

The Highway Commission argues that because plaintiffs Kallemyn, Tuter and Leembruggen failed to file charges of discrimination with the Equal Employment Opportunity Commission, they cannot stand as individual plaintiffs in this action. Although the Commission concedes that these plaintiffs are members of the class, the Commission nonetheless contends that this Court lacks jurisdiction over their individual claims. In *Allen v. Amalgamated Transit Union Local 788,* 554 F.2d 876 (8th Cir. 1977), however, the Eighth Circuit held that not every original plaintiff in a multiple-plaintiff, non-class action suit must file charges with the E.E.O.C. In *Allen,* although only two of fifteen plaintiffs had filed charges with the E.E.O.C., the Court concluded that all fifteen plaintiffs were entitled to assert claims for back pay and seniority. *Id.* at 882-83. The court in *Allen* noted that the thirteen additional plaintiffs alleged facts demonstrating that they were similarly situated and had received the same discriminatory treatment as the plaintiffs who had filed E.E.O.C. charges. According to *Allen,* under such circumstances, "particularly where the discrimination is continuing, it would be nonsensical to require each of the plaintiffs to individually file administrative charges with the E.E.O.C. Defendants have in no way been placed in jeopardy." *Id.* In the present case, the allegations and the evidence clearly establish that the three individual plaintiffs are similarly situated and

have received the same discriminatory treatment as Jane Catlett. All of the individual plaintiffs have demonstrated that they have been denied employment opportunities as a result of the same recruiting and hiring procedures used by the Highway Commission and, accordingly, this Court has jurisdiction over their individual claims in light of the Eighth Circuit's ruling in *Allen*. *See also Crawford v. United States Steel Corp.*, 660 F.2d 663, 665 (5th Cir. 1981).

An examination of the evidence in this case reveals that each of the named plaintiffs, Catlett, Tuter, Leembruggen and Kallemyn has established a prima facie case of discrimination in hiring. Each individual plaintiff has demonstrated that she applied for and was qualified for the maintenanceman position, that she was rejected for the position despite her qualifications, and that after she was rejected, the position remained open and the employer continued to seek applicants from persons of the plaintiff's qualifications. Accordingly, the establishment of the prima facie case shifts the burden of production to the Highway Commission to articulate a legitimate, non-discriminatory reason for the plaintiff's treatment.

In response, the Highway Commission argues that Catlett, Kallemyn, and Tutuer were not hired because other applicants with better qualifications were hired. The Highway Commission also contends that Catlett was not hired because she refused to update her application in 1977, and because she failed to respond in a timely manner to the Highway Commission's request for an interview in 1978. Regarding Leembruggen, the Highway Commission does not advance any non-discriminatory reason for its failure to hire, and suggests only that there was no proof that the Commission discriminated against her. In considering the Commission's rebuttal arguments, the Court is aware that an employer does not have to prove the absence of discriminatory motive in order to successfully respond to the plaintiff's prima facie case; rather, the employer need only produce evidence articulating a legitimate, non-discriminatory

reason for the plaintiff's treatment. Viewed in light of these standards, the Commission has met this burden with respect to plaintiffs Catlett, Kallemyn, and Tuter, but has not rebutted the prima facie showing of Leembruggen. The Court is convinced, however, that the reasons articulated by the Highway Commission are pretextual, and that the preponderance of the evidence establishes that each of the four named plaintiffs was subject to discriminatory treatment which resulted in gender-based denial of employment opportunities.

During plaintiff Kallemyn's interviews, the interviewers downgraded her qualifications, focused more on her appearance, and expressed their belief that she would not be able to handle the negative aspects of the maintenanceman position. Despite the Commission's contention that better qualified applicants were hired for the three positions for which Kallemyn was considered, there were numerous vacancies during the period of time Kalleymyn's application was active which were filled by male applicants who did not possess qualifications superior to Kallemyn's. Similarly, during the period of time Leembruggen's application was active, ten males with qualifications similar to hers were hired. Likewise, twenty-seven males with qualifications similar to those of Grace Tuter were hired during the year following her application.

A review of the circumstances surrounding Jane Catlett's experiences with District Eight clearly demonstrate that the reasons articulated by the Commission for not hiring her are mere pretexts for its discriminatory conduct. On June 25, 1975, Jane Catlett inquired at the Marshfield shed about a vacancy which the Commission was about to fill. Although a hiring decision was to be made in the near future, the area supervisor tried to deceive Catlett by telling her that there was no need for her to complete the applications promptly. Nonetheless, Catlett completed her application and returned it to the shed early the next day. When Catlett returned the application, the area supervisor was uncooperative and refused to discuss Catlett's

application with her. Later that morning, the supervisor drove to the district offices in Springfield, advised the maintenance and traffic engineer that a female had applied for the vacancy, and recommended that a male applicant be hired for the position. Catlett was not hired for this opening, nor was she interviewed for it, and during the year that her application was active, nine males were hired in District Eight with qualifications similar to Catlett's.

It was not until after Catlett filed a charge of discrimination with the E.E.O.C. that she was contacted for an employment interview. At the interview, the hiring officials tried to discourage Catlett from pursuing employment with the Commission by their emphasis of the negative aspects of the job and by their reluctance to discuss the job's benefits. At the interview, the interviewers were more concerned with Catlett's personal appearance than with her qualifications. Finally, during the time periods Catlett's application and supplements were active, there were more than thirty vacancies, for which numerous male applicants were hired with qualifications similar or inferior to Catlett's.

A careful review of the evidence in this case clearly establishes that plaintiffs Catlett, Tuter, Leembruggen and Kallemyn each have shown that they were intentionally denied employment opportunities on account of their sex. Just as the class members were subjected to a pattern of discrimination resulting from the biased interview process and the unregulated hiring procedure, similarly, these plaintiffs were the individual victims of the same practices.

In conclusion, this Court finds that the Missouri State Highway Commission, through its hiring policies, has engaged in a practice of discrimination against female applicants for the maintenanceman position. It is a serious matter when any employer engages in employment discrimination, but it seems particularly grave for the State to practice discrimination against its own citizens, as these are the people who pay the

taxes that support and maintain the government, and whom the elected and appointed officials are to serve. It is distressing and demeaning that a branch of the Missouri state government should be guilty of unlawful discrimination against its own citizens.

Accordingly, it is hereby

ORDERED that judgment be entered in favor of the class and against the Missouri State Highway Commission on the Title VII class action claim. It is further

ORDERED that judgment be entered in favor of plaintiffs Jane Catlett, Adeline Kallemyn, Grace Tuter and Patricia Leembruggen and against the Missouri State Highway Commission on the individual Title VII claims. It is further

ORDERED that within fifteen (15) days of the date of this order, the parties are to submit a discovery schedule regarding the relief and damages stage of this litigation.

/s/ Scott O. Wright
United States District Judge

December 5, 1983.

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

No. 78-4061-CV-C

Jane Catlett, et al.,
Plaintiffs,

vs.

Missouri State Highway Commission, et al.,
Defendants.

ORDER

(Filed: December 18, 1985)

This is a class action sex discrimination case brought pursuant to 42 U.S.C. §1983 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e *et seq.* The Court previously ordered the suit to be severed into separate trials on the issues of (a) liability and (b) prospective equitable relief, monetary damages and attorneys' fees. In its order of December 5, 1983, the Court found defendants liable under Title VII for sex discrimination against the four individually-named plaintiffs for failure to hire them as maintenance crew members, and liable for sex discrimination against the class in recruitment and hiring since 1975. *Catlett v. Mo. Highway & Transp. Com'n,* 589 F. Supp. 929 (W.D. Mo. 1983) (Catlett I).

Pending before the Court are the parties' motions for summary judgment on various issues concerning remedial relief pursuant to Title VII. There is no genuine issue as to the following material facts, and so under Fed.R.Civ.P. 56 summary judgment is appropriate on the following specified issues.

I. TITLE VII MONETARY RELIEF

A. Back Pay for Individually-named Plaintiffs

Defendants argue that because the jury verdict was adverse to the four named plaintiffs on their §1983 claim, remedial relief for those plaintiffs would be improper. For two reasons, the Court disagrees.

First, the defendants have not previously raised this issue of collateral estoppel. Thus, the Court is faced with the identical problem presented to the Eighth Circuit in *Goodwin v. Circuit Court of St. Louis County, Mo.*, 729 F.2d 541, 549 n. 11 (8th Cir. 1984). There, as here, "counsel for all parties seem to have assumed that the court would make its own finding on the issue of discrimination, whichever way the jury verdict went on the §1983 case." In *Goodwin* the court refused to apply res judicata against the Circuit Court. Defendants also cite *Brooks v. Carnation Pet Food Company,* No. 84-6105-CV-SJ-6 (W.D. Mo., Sept. 17, 1985) in support of their proposition. However, Judge Sachs distinguished the *Goodwin* case by noting that defendant Carnation Pet Food Company had raised the argument that the court is bound by estoppel in its proposed conclusions of law. *Id.* at slip op. 4 n. 3. In the present case, defendants' proposed conclusions of law failed to raise this issue.

Secondly, even if defendants had timely raised this issue, remedial relief would still be appropriate. In *Brooks, supra,* the plaintiff's Title VII theory was one of disparate treatment, so the burden of establishing *intentional* discrimination was identical to that under §1981. In the present case, the Court found evidence not only of disparate treatment but also disparate impact,[1] for which no intent need be established. Therefore, even

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[1] "Just as the class members were subjected to a pattern of discrimination resulting from the biased interview process and the unregulated hiring procedure, similarly, these plaintiffs were the individual victims of the same practices." *Catlett I, supra* at 949.

if defendants' verdict on the §1983 claim precluded a disparate treatment claim, the disparate impact claim would not be affected, and relief would be appropriate. Calculation of back pay is discussed *infra*.

B. Back Pay for Class Members

Excluding the individual plaintiffs, there are 161 claimants who seek back pay. Defendants seek to disqualify a number of class members on five different grounds: (1) lacked lightweight equipment experience; (2) lacked a valid Missouri driver's license; (3) stated no discrimination against them; (4) stated would not have accepted a job in maintenance had she been offered one; (5) no vacancies occurred within 20 miles of residence. During the remedial stage, the burden of proof is on defendants to demonstrate that individual applicants were denied employment for lawful reasons. *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 362 (1977).

In *Catlett I, supra* at 993, the Court made a finding of fact that the basic requirements for initial hire into the maintenance job are an eighth-grade education and an ability to operate lightweight motor equipment. Plaintiffs concede that ten of the class members did not list such experience on their claim forms, but wish to add new information by affidavit at this time. The Court finds it would be inappropriate to consider this additional evidence. Therefore, the following class members were not qualified applicants and not entitled to relief:

Bailey, Aughty L.

Buehler, Staci L.

Farris, Debra

Fowler, Debbie J. (Rodriquez)

Garrett, Jayne L. (Warren)

Lyons, Debbie J. (Deprender)

Maxwell, Lorenzo P.

Meyer, Paula (Fannon)

Rodgers, Janet L.

Stewart, Brenda.

The Court finds the remainder of defendants' attempts at disqualification to be specious. An applicant could readily obtain a Missouri driver's license, or if offered a job could relocate to live closer to the job site. Calculation of back pay for the remaining 151 member is discussed *infra*.

C. Calculation of Back Pay

1. Fringe benefits of mitigation

Plaintiffs are entitled to a back pay award pursuant to 42 U.S.C. §2000e-5(g). In light of Title VII's policy to make whole a victim of discrimination, the award of back pay should include not only the straight salary, but raises and fringe benefits as well. *Rasimas v. Michigan Dept. of Mental Health,* 714 F.2d 614, 626 (6th Cir. 1983); *Meyers v. I.T.T. Diversified Credit Corp.,* 527 F. Supp. 1064, 1070 (E.D. Mo. 1981). Fringe benefits should include sick leave, vacation pay, pension benefits and any other benefits the claimants should have received but for the discrimination.

Additionally, under §2000e-5(g), the claimants' interim earnings are to be deducted from the awarded back pay. Fringe benefits should likewise be deducted as interim earnings. Defendants argue that unemployment benefits or workmen's compensation should also be deducted. However, such benefits have been deemed by the Court to be a collateral source, and should not be deducted. *Donovan v. George Lai Contracting, Ltd.,* No. 84-4154-CV-C-5 (W.D. Mo. July, 1985). *See also Craig v. Y & Y Snacks,* 721 F.2d 77, 83 (3rd Cir. 1983); *Rasimas, supra* at 627.

Thus, for the individually-named plaintiffs, each should be awarded back pay and lost fringe benefits from the date she was deprived of the use of those monies when the Highway Department hired a comparable male in her place. This amount will then be offset by that plaintiff's actual earnings and fringe benefits during the same time period.

2. Formula for Class Members

All parties agree that class-wide relief would be most appropriate in this case as explained in *Hameed v. Ironworkers,* 637 F.2d 506 (8th Cir. 1980). However, the *Hameed* formula, *id.* at 520, must be adapted in this case to account for the discriminatory recruitment process. In its earlier findings of fact, *Catlett I,* 589 F. Supp. at 934, the Court determined the expected number of female hires for the years 1975-79. The Court presented figures for both a moderate and conservative definition of women expected to be hired.[2] While defendants argue it would be punitive to apply anything but the conservative definition, the Court finds that the moderate definition would best fulfill Title VII's statutory purpose of making persons whole for injuries suffered through past discrimination. Therefore, back

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[2]

	Total Hires	Females Hired	Expected Hires, Conservative Definition	Expected Hires, Moderate Definition
1975	8	0	3	4
1976	22	1	8	10
1977	23	2	8	11
1978	26	5	9	12
1979	16	0	6	8

pay calculations will be based on thirty-eight vacancies.[3] From these figures, the number of females actually hired should be subtracted, to equal the number of vacancies for which back pay must be calculated.

The next step is to assign the 151 remaining class members to subclasses based upon the year in which they applied for maintenance crew member positions. The number of vacancies for that year will be multiplied by the amount of money those positions would have yielded to date,[4] less the *average* interim earnings (as opposed to the highest interim earnings) of those class members during the relevant time period. The money will then be divided equally among the members of that year's subclass.

3. Pre-judgment Interest

Plaintiffs contend they should be granted an award of pre-judgment interest on any award of back pay and fringe benefits. Plaintiffs cite numerous cases where this Court and others have used their discretion to allow pre-judgment interest.[5] However, all these cases deal with private sector employers, not the government as employer. The general rule when claims against the government are involved is that interest is proscribed absent express statutory or contractual authorization. *Saunders v. Clayton,* 629 F.2d 596, 598 (9th Cir. 1980).

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[3] This includes one additional expected female hire during the period of January 1 - May 31, 1980.

[4] The Court rejects defendants' argument of calculating the earnings of initial hires only. Instead, calculations will be based on vacancies; therefore, initial plus successive hires will be calculated.

[5] *Parsons v. Kaiser Aluminum,* 737 F.2d 473 (5th Cir. 1984); *EEOC v. Wooster Brush Co.,* 727 F.2d 366 (6th Cir. 1984); *Washington v. Kroger Co.,* 671 F.2d 1072 (8th Cir. 1982); *U.S. v. Leeway Motor Freight,* 625 F.2d 919 (10th Cir. 1979).

Plaintiffs cite no state or federal statute authorizing pre-judgment interest. They do argue that, under 42 U.S.C. §2000e-16, when Congress extended Title VII benefits to public employees, Congress intended them to receive the same rights as extended to private sector employees. *See Chandler v. Roudebush,* 425 U.S. 840, 841 (1976). However, numerous courts have since interpreted this section *not* to include the right to pre-judgment interest. *Saunders v. Clayton, supra,* at 598; *Blake v. Califano,* 626 F.2d 891, 893 (D.C. 1980); *Richerson v. Jones,* 551 F.2d 918, 925 (3rd Cir. 1977).

While neither party has cited a case directly on point where interest was granted or denied in a Title VII case against a state agency as employer, defendants' argument is more persuasive since the state is clearly more analogous to the federal government than to private sector employers. Therefore, the Court finds that "other equitable relief" as authorized by 42 U.S.C. §2000-e-5 does not include pre-judgment interest.

4. Special Master

While plaintiffs contend a special master should be appointed to compute the back pay award, defendants believe such computation should be relatively easy once the Court has ruled on the necessary elements. In light of this order's rulings, plaintiffs should submit their calculations for back pay to the Court. Defendants will have an opportunity to object to any of the calculations, and if there are disagreements, then a special master may be appointed at that time.

II. INJUNCTIVE RELIEF

While defendants argue that their voluntary efforts in changing their hiring practices are enough to preclude additional affirmative relief, the Court finds the long history of discrimination and the comparatively short history of attempts to end such discrimination warrant further measures in the following respects:

(1) The Court will retain jurisdiction until January 1, 1990, to monitor the implementation of this order and to require additional specific action, if necessary, to eradicate any remaining discrimination;

(2) Between the date of this order and January 1, 1990, the Missouri Highway and Transportation Commission shall comply with a hiring plan, attached to this order as Appendix A, the goal of which is to generate an actual pool of female applicants for maintenance jobs in District 8 of between 37%-48%, and to fill 37%-48% new vacancies for maintenance jobs in District 8 with women;

(3) To remedy the Highway Commission's discriminatory recruitment policy, the title of the job category shall be changed from maintenanceman to reflect a job available to females as well as males. The Highway Department shall cease to utilize "word-of-mouth" or "walk-in only" recruitment, and instead implement recruitment literature and practices as set out in Appendix B, attached to this order;

(4) The Highway Commission shall develop a new application form which seeks relevant, non-discriminatory information from applicants and which incorporates the changes as set out in Appendix C, attached to this order;

(5) New procedures for interviews and the training of interviewers shall be implemented, as set out in Appendix D, attached to this order, to facilitate a non-discriminatory process for hiring;

(6) Those claimants who still seek employment as maintenance crew members shall be placed on a preferential hiring list. The first available vacancy at a particular maintenance shed shall be offered to the earliest applying claimant who would accept employment at that shed, and so on until the list of eligible claimants who seek employment is exhausted. Once a claimant turns down an offer of employment for any reason, she shall drop off the preferential hiring list, but may be considered for future employment.

III. CONCLUSION

In light of the foregoing, it is hereby

ORDERED that defendants' motion for summary judgment is granted with respect to:

(1) disqualifying those class members who did not list lightweight motor equipment experience;

(2) precluding an award of pre-judgment interest; and

(3) declining the use of a special master absent any disagreement as to calculations of back pay.

It is further

ORDERED that the remainder of defendants' motion for summary judgment is denied. It is further

ORDERED that plaintiffs' motion for summary judgment is granted with respect to:

(1) back pay for individually-named plaintiffs;

(2) calculation of back pay for the remaining 151 class members as set out in this order; and

(3) additional affirmative relief as set out in the order and attached appendices.

It is further

ORDERED that plaintiffs should submit a motion for attorneys' fees and costs within twenty (20 days of the date of this order, with defendants having an additional fifteen (15) days to respond.

/s/ Scott O. Wright
United States District Judge

December 13, 1985.

APPENDIX A

PLAN FOR HIRING

1. The Missouri Highway and Transportation Commission shall, on February 1, 1986, and January 1 of each subsequent year thereto to and including January 1, 1990, file a report with the Court and serve a copy of same upon plaintiffs, which report shall contain the following information:

a. A breakdown of applicants for maintenance crew positions, by sex, by month;

b. A breakdown of hires for maintenance crew by positions, by sex, by month, by maintenance shed;

c. A census of all employees in maintenance crew positions by name, sex, job title, and District.

2. To support such an accounting, the Highway Commission shall maintain all applications filed for maintenance crew positions and all personnel selection forms for hirees to maintenance crew positions in District 8.

3. Between the date of this order and January 1, 1990, the Highway Department in District 8 shall generate an actual pool of applicants for the maintenance job in District 8 which consists of between 37%-48% women. The Court shall review the actual applicant pool yearly and if, at the conclusion of 1988, substantial progress has not been made, further stringent measures may be imposed by the Court. If by January 1, 1990, the Court determines that these goals have been met, the Court will terminate its jurisdiction.

4. Between the date of this order and January 1, 1990, the Highway Department in District 8 shall fill between 37%-48% new vacancies for maintenance crew jobs in District 8 with women (which may include eligible class claimants). The Court shall review the hire rates by sex yearly and if at the conclusion of 1988, substantial progress has not been made, further strin-

gent measures may be imposed by the Court. If by January 1, 1990, the Court determines that these goals have been met, the Court will terminate its jurisdiction.

APPENDIX B

RECRUITMENT

1. The Highway Commission shall develop local newspaper advertisements which clearly indicate that women applicants are desired for the entry maintenance crew positions.

2. The Highway Commission shall develop a brochure to be distributed to the local high schools in the area which describes the job of a maintenance person and shows photographs of men and women doing the jobs.

The Highway Commission shall identify the sources of women applicants in the community: women's organizations, social service agencies, etc., and shall distribute a brochure to advise them of the openings for women in these positions.

The Highway Commission shall post notices of maintenance crew vacancies in areas accessible to all employees.

5. For each job vacancy, the Highway Commission shall: (a) Review all active job applications for persons who have indicated they would consider a job at that location. (b) If no active female applications are on file for that location, advertise the position on local radio stations and in the newspapers before interviewing. Also, contact the Missouri Employment Security Service, and local women's groups identified earlier to advise them of openings (if class member) before a selection is made.

APPENDIX C

APPLICATION PROCESS

The following questions will be listed:

a. Will you accept a position at any location in the state?
_____Yes _____No

b. Check each of the locations where you would accept a position, if offered. (You must be willing to move within approximately a 20-30 minute drive to work.) (List all maintenance sheds in the district and have a small map with number codes showing where each shed is located.)

c. Of the locations checked in item 2, indicate, in order of preference, the top three locations at which you would prefer to work.

d. Check any of the following skills in which you have been trained.

____Operate Tractor ____Diesel Engine Repair

____Operate Backhoe ____Gasoline Engine Repair

____Drive Pickup Truck ____Light Equipment Operator

____Small Engine Repair ____Heavy Equipment Operator

____Snow Plow

e. Check any of the following skills which you now have from paid or unpaid experience.

____Operate Tractor ____Diesel Engine Repair

____Operate Backhoe ____Gasoline Engine Repair

____Drive Pickup Truck ____Light Equipment Operator

____Small Engine Repair ____Heavy Equipment Operator

____Snow Plow

f. On section for employment history, add these instructions: ALSO LIST ANY SELF-EMPLOYMENT OR PAID OR NON-PAID FARM EXPERIENCE.

APPENDIX D

INTERVIEWS AND TRAINING OF INTERVIEWERS

1. A taped or videotaped description of the job will be developed to be shown to all interviewees.

2. The interview checklist shall be used in all interviews, that utilizes nøn-discriminatory, job-related criteria.

3. All discriminatory comments and references shall be eliminated from the interview.

4. No persons other than the interviewer and supervisory personnel shall be present for an interview.

5. All persons interviewing applicants for entry maintenance positions shall be given a one-day training course on conducting non-discriminatory interviews and using non-discriminatory evaluation criteria.

6. Supervisory personnel shall observe one interview per month of each interviewer for one year and evaluate the interviewer's conduct in the interview with regard to equal employment opportunity.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI

No. 78 4061 CV C 5

Jane Catlett, et al.

v.

Missouri State Highway Commission, et al.

Scott O. Wright, Judge

Decision by Court. This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

(Filed: December 16, 1985)

ORDERED that defendants' motion for summary judgment is granted with respect to:

(1) disqualifying those class members who did not list lightweight motor equipment experience;

(2) precluding an award of pre-judgment interest; and

(3) declining the use of a special master absent any disagreements as to calculations of back pay.

It is further

ORDERED that the remainder of defendants' motion for summary judgment is denied. It is further

ORDERED that plaintiffs' motion for summary judgment is granted with respect to:

(1) back pay for individually-named plaintiffs;

(2) calculation of back pay for the remaining 151 class members as set out in this order; and

(3) additional affirmative relief as set out in the order and attached appendices.

It is further

ORDERED that plaintiffs should submit a motion for attorneys' fees and costs within twenty (20) days of the date of this order, with defendants having an additional fifteen (15) days to respond.

Entered on December 16, 1985

Clerk: R.F. Connor

(By) Deputy Clerk: /s/ B.F. Walking

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

No. 78-4061-CV-C-5

Jane Catlett, et al.,
Plaintiffs,

vs.

Missouri State Highway Commission, et al.,
Defendants.

ORDER AND MEMORANDUM

(Filed: August 9, 1982)

This is a suit for a class action against the Missouri Highway and Transportation Commission alleging sex dicrimination in employment in violation of Title VII, 42 USC §2000 *et seq*. The representative plaintiffs, Jane Catlett, Patricia Leembruggen, Grace Tuter and Adeline Kallemyn, have specifically alleged that the Commission has failed and refused to hire women into maintenance positions, has established and maintained job specifications for maintenance jobs which result in the exclusion of women on the basis of their gender, has maintained a policy and practice of recruitment which has the effect of denying job opportunities to qualified female applicants, and refused to take affirmative action to correct these alleged discriminatory practices and policies. They have moved for a determination that this case be conducted as a Rule 23(b)(2) class action and have asked to represent all women who have applied or who might have applied for maintenance jobs with the Commission beginning on January 1, 1975.

On October 27, 1981, this Court preliminarily ruled that a class action was the appropriate procedural vehicle for the prosecution of the Title VII claims. On February 26, 1982, the Court ordered separate trials on the issues of (1) liability and (2)

prospective equitable relief, monetary damages and attorneys' fees. On May 10, 1982, a hearing was held to determine whether a class action was still the most appropriate procedural vehicle, whether the membership of the class should encompass all ten districts of the Commission or only District Eight, and whether discoverable matters should be limited to the time period between January 1, 1975 and May, 1980. For the reasons which follow, the Court determines that a Rule 23(b)(3) class should remain certified and that the class should be composed of all women who applied or who might have applied for a maintenance position in District Eight of the Commission from January 1, 1975 to May of 1980.

I. FINDINGS OF FACT

1. Plaintiffs Catlett, Leembruggen, Tuter, and Kallemyn filed an application for employment with the District Eight office of the Commission. Catlett has filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") on July 21, 1975, a charge of discrimination with the Missouri Human Rights Commission on the same day, and has perfected the charge with the EEOC on December 6, 1976. A "right to sue" letter was issued on December 6, 1977.

2. The Commission is an "employer" as the term is defined in Section 701(b) of Title VII. *See* 29 USC §2000e(b). It is divided into ten geographic districts. Each district has a headquarters office which is headed by a District Engineer.

3. Robert Hunter is the Chief Engineer of the Commission. V.B. Unsell is the District Engineer of District Eight in Springfield, Missouri.

4. The Commission entered into a conciliation agreement with the EEOC concerning the employment of minorities in maintenance positions. The agreement was in effect from June 7, 1977 to December of 1981. In May of 1980 a hiring freeze was imposed on all districts with respect to all positions.

5. Each district office implements its own employment policies with respect to recruitment and selection of employees. Guidance for hiring practices is provided to all district offices by the Personnel Management Manual which is produced at the central offices of the Commission. Application and interview report forms are also provided to the district offices by the central office. Not all of the district offices use the forms. Several of the district offices apply more stringent requirements in their hiring practices than those described in the Manual.

6. The selection process in District One, which is headquartered in St. Joseph, Missouri, does not provide for a preliminary interview of a "walk-in" applicant. The District does require that applicants for a maintenance position reside with 20 to 30 miles of the building to which they might be assigned. Female applications are placed in a separate file in order to ensure that each female applicant who resides in the area where a vacancy has occurred can be contacted for an interview. All male applicants, however, are not interviewed. The file of a male applicant who fails to interview after an invitation has been extended becomes inactive. The file of a female applicant is not inactivated until she fails to accept a second invitation to interview. All applicants are informed of the invitation to interview through the mails. The interview is conducted by the Supervisor and Maintenance Foreman. Interview reports are filed at the conclusion of each interview.

7. The selection process in District Two, which is headquartered in Macon, Missouri, does provide for a preliminary interview of a "walk-in" applicant. The interview is conducted by the office manager or office manager's assistant. An interview report is not filed after the interview is completed. When a maintenance position becomes vacant, the District Maintenance and Traffic Engineer reviews the applications on file and, from the file, selects those applicants who are deemed qualified for a "vacancy" interview. Only those applicants who reside within 12 miles of the place where the vacancy will be filled or who in-

dicate that they will move within the 12-mile limit are likely to be chosen for the "vacancy" interview. The "vacancy" interview is conducted by the District Maintenance and Traffic Engineer, the Maintenance Area Supervisor and the Foreman. An interview report is completed, but only by the Maintenance and Traffic Engineer. District Two does not check the references listed on the application.

8. The selection process in District Three, which is headquartered in Hannibal, Missouri, provides for a preliminary interview of a "walk-in" applicant by the District Maintenance Clerk. The preliminary interviews have been recently discontinued. All applications are filed at the District Office under the name of the particular maintenance area supervisor who has responsibility for the territory where the applicant resides. When a maintenance position becomes vacant, the supervisor selects several applications from those on file and invites the selected applicants to interview for the vacancy. The District Maintenance and Traffic Engineer conducts a group interview of the selected applicants. An applicant must reside within 20 miles of the place where the vacancy has occurred.

9. The selection process in District Four, which is headquartered in Kansas City, Missouri, provides for a preliminary interview of all "walk-in" applicants by the District Auditor or the District Maintenance Clerk. When a maintenance position becomes vacant, the District Auditor or District Maintenance Clerk selects certain applicants for a "vacancy" interview. An applicant must reside within either 15 minutes or 15 miles of the place where the vacancy occurs. The "vacancy" interviews are conducted by the Maintenance Area Supervisor and the Foreman.

10. The selection process in District Five, which is headquartered in Jefferson City, Missouri, has utilized three different types of selection processes since 1975. During the period from 1975 to 1977, the applicants for a maintenance position

who resided within 10 miles of the place where a vacancy occurred were invited to interview with the Superintendent. No preliminary "walk-in" interviews were ever conducted. If an applicant failed to appear for a "vacancy" interview, that applicant's file was rendered inactive. During the period from 1977 to May of 1980 a preliminary "walk-in" interview was conducted. When a maintenance position became vacant, the Maintenance Supervisor selected certain applicants who resided with 10 miles of the place where the vacancy occurred for an interview. Interview reports were filed. Beginning in May of 1980, the District has conducted no interviews of either type.

11. The selection process in District Six, which is headquartered in Kirkwood, Missouri, varies with respect to whether a maintenance position becomes vacant at an urban or rural post. In rural areas, an applicant must appear at the local maintenance building. The Maintenance Area Supervisor interviews the applicants and makes the determination as to whether the applicant should be employed. In the urban area, candidates must apply at the District office. When a maintenance position becomes vacant, the Maintenance Area Supervisor reviews the applications on file and selects certain applicants for an interview. No interview report is filed. The supervisors select candidates based on criteria known only to the individual supervisor. An applicant must reside within 20 minutes of the place where a vacancy has occurred.

12. The selection process in District Seven, which is located in Joplin, Missouri, does not provide for a preliminary "walk-in" interview, unless one is requested by the applicant. The applications are filed in accordance with the geographic area in which the applicant resides. When a maintenance position becomes vacant, all female applicants who reside in the geographic area where the vacancy has occurred are selected for "vacancy" interviews. The male applicants are screened by the Maintenance Superintendent. If a male fails to attend a "vacancy" interview, his application is inactivated. If a female

fails to attend a "vacancy" interview, her application is not inactivated and she remains eligible for an additional interview. Interview reports are filed by the Superintendent, Supervisor or Foreman. An applicant must reside within 15 to 20 minutes of the place where the vacancy has occurred. The District does not contact the references listed on the application.

13. The selection process in District Eight, which is headquartered in Springfield, Missouri, does not provide for a preliminary interview of a "walk-in" applicant. When a maintenance position becomes vacant, the Maintenance Area Supervisor and Maintenance Superintendent review the applications and select certain applicants for a "vacancy" interview. During the period from 1975 to 1977, all female applicants were invited to interview. Beginning in 1977, female applicants were screened in the same manner as male applicants. If an applicant fails to attend a "vacancy" interview, the applicant's file is rendered inactive. An applicant must reside within 20 minutes of the place where the vacancy is to be filled.

14. The selection process in District Nine, which is headquartered in Willow Springs, Missouri, announces the need to fill a vacancy in the maintenance position through advertisements in local newspapers. Applications are received and interviews are conducted at the place where the vacancy has occurred. Applications are kept active from six months to one year.

15. The selection process in District Ten, which is located at Sikeston, Missouri, does not provide for a preliminary "walk-in" interview of an applicant. When applications are made at the District office, the applicants are given information concerning the prospective employment and are asked to select those places at which they wish to work. References listed on the application are checked. When a maintenance position becomes vacant, all applicants who indicated an interest in working in the area where the vacancy occurred are invited to interview with the Maintenance Superintendent. The

Superintendent makes hiring recommendations to the District Maintenance and Traffic Engineer, who makes the ultimate decision to hire. An interview report is not filed.

II. CONCLUSIONS OF LAW

A. Appropriateness of a Class Action.

The class action device is the most appropriate procedural vehicle for the accomplishment of the fair and efficient adjudication of this controversy. Rule 23(a) provides that these four plaintiffs may bring suit as representatives of a class if

> (1) The class is so numerous that joinder of all members is impracticable, (2) there are questions of law and fact common to the class, (3) the claims or defenses or representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Before the circumstances of this case can be analyzed in terms of those four prerequisites, however, the introductory language of Rule 23(a) implicitly requires that a class must actually exist and that these plaintiffs are members of the proposed class. As the Court subsequently explains, the Class is composed of all women who applied or who might have applied for a maintenance position in District Eight of the Commission from January 1, 1975 to May of 1980. The four plaintiffs are members of that Class.

In addition to satisfying those two prerequisites, each of the four Rule 23(a) prerequisites have been satisfactorily established. With respect to the "numerosity," "typicality," and "adequacy" criteria, the defendants concede that the plaintiffs have satisfactorily established them. The Court agrees. With respect to the "commonality" criterium, there is some dispute among the parties. The defendants concede that this criterium is satisfied if the Class is limited to the geographic area of

District Eight. The plaintiffs seek to broaden the geographic area to the entire State of Missouri.

As the Findings of Fact manifest, the hiring practices differ with respect to each of the ten districts. Because the practices differ, questions of fact are not common to each female who has applied for a maintenance position in the State. Though each district may be following practices which violate Title VII, those practices are beyond the scope of this particular controversy. The "commonality" requirement of Rule 23(a)(2) is only satisfied where the Class is limited to the geographic area of District Eight. *See, Like v. Carter,* 448 F.2d 798, 802 (8th Cir. 1971), *cert. denied,* 405 U.S 1045 (1972).

One additional reason for limiting the geographic scope of Class membership to District Eight focuses on manageability. *See, e.g., Dore v. Kleppe,* 522 F.2d 1369, 1375 (5th Cir. 1976); *Plekowski v. Ralston Purina Co.,* 68 F.R.D. 443 (M.D. Ga. 1975); *Shaw v. Mobil Oil Corp.,* 60 F.R.D. 566 (D. N.H. 1966). The Court has previously severed the liability and damage issues into two trials in order to better manage this complex litigation. If the Class were to be composed of female applicants from all ten districts, the trial on the merits of the liability issue would be wholly unmanageable. If litigation is warranted, each district should be separately sued.

In addition to satisfying the four prerequisites to Rule 23(a), the action also satisfies the dictates of Rule 23(b)(3). The defendants have conceded that a Rule 23(b)(3) class action is appropriate where Class membership is limited to District Eight. Since the class has been limited to District Eight, this action is designated as a Rule 23(b)(3) class.

B. Limiting Discovery

A hiring freeze was instituted in May of 1980. No maintenance vacancies have been filled in District Eight since that time. Thus, discovery is limited to the time period begin-

ning on January 1, 1975 and ending on the last day of May, 1980.

III. CONCLUSION

Accordingly, it is hereby

ORDERED that a Rule 23(b)(3) class remain certified. It is further

ORDERED that the Class be composed of all women who applied or who might have applied for a maintenance position in District Eight of the Commission between January 1, 1975 and the last day of May, 1980. It is further

ORDERED that discovery be limited to the period between January 1, 1975 and the last day of May, 1980.

/s/ Scott O. Wright
United States District Judge

August 9, 1982.

Supreme Court, U.S.
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APR 6 1988
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CLERK

No. 87-1416

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JANE CATLETT, PATRICIA LEEMBRUGGEN, GRACE TUTER and ADELINE KALLEMYN, individually and on behalf of all others similarly situated,

Petitioners,

v.

MISSOURI HIGHWAY AND TRANSPORTATION COMMISSION; ROBERT N. HUNTER, CHIEF ENGINEER OF THE MISSOURI HIGHWAY AND TRANSPORTATION COMMISSION AND V.B. UNSELL, DISTRICT ENGINEER FOR DISTRICT 8 OF THE MISSOURI HIGHWAY AND TRANSPORTATION COMMISSION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals properly refused to require respondents to employ sex-conscious hiring goals as a remedy in a sex discrimination case where there is no history of non-compliance and no basis for assuming that respondents would not comply with a prohibitory injunction against future discrimination.

2. Whether the court of appeals properly held that petitioners' individual Title VII claims were barred by the jury's findings under 42 U.S.C. § 1983 that none of the individual defendants had been subject to discriminatory treatment by respondents.

3. Whether the court of appeals properly held that the district court had not abused its discretion in declining to certify a state-wide class of plaintiffs when it appeared that the hiring practices at issue would vary on a district-by-district basis.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

Missouri Highway and Transportation Commission, Robert N. Hunter and V.B. Unsell (collectively "respondents") hereby oppose the petition for a writ of certiorari filed by Jane Catlett, Patricia Leembruggen, Grace Tuter and Adeline Kallemyn (collectively "petitioners") in this case.

STATEMENT

Petitioners are four females who applied for maintenance positions in District Eight of the Missouri Highway and Transportation Commission but were denied

employment. Petitioners filed a class action lawsuit against the Commission, respondent Hunter (the Commission's chief engineer), and respondent Unsell (the Commission's district engineer for District Eight) alleging sex discrimination in violation of Title VII, 42 U.S.C. § 2000e, *et seq.*, and Section 1983, 42 U.S.C. § 1983. Pet. App. A5.[1] Respondents have previously filed a petition for a writ of certiorari in this case (No. 87-1415), in which they presented two questions concerning the legal bases upon which class-based liability was imposed by the courts below. The essential statement of the case is set out in that petition, No. 87-1415, Pet. 3-7.

1. With respect to the questions presented by petitioners herein, the relevant facts are as follows. Prior to trial the district court denied petitioners' request that a state-wide class of plaintiffs be certified. The court concluded that a district-wide class was more appropriate because each district had distinct employment practices and a trial involving all ten districts would be unmanageable. Pet. 17.

After trial the district court held that the jury's finding under Section 1983 that none of the four petitioners had been intentionally discriminated against by respondents did not preclude the court from finding for the petitioners under Title VII. Accordingly, the district court analyzed each petitioner's contention that she had been treated discriminatorily because of her sex. The court found that all four petitioners had established a prima facie case and that respondents had failed to provide a non-pretextual, legitimate "reason for the [petitioners'] treatment." Pet. App. A59. Accordingly, the district court entered judgment for each individual petitioner.

On the issue of remedy, the district court held that an injunction against further discrimination was inadequate in light of "the long history of discrimination and the

[1] "Pet. App." refers to the appendix to the petition in No. 87-1415.

comparatively short history of attempts to end such discrimination . . . ." Pet. App. A69. Specifically, the court imposed a goal "to fill 37%—48% new vacancies for maintenance jobs in District 8 with women." *Id.* at A70. To monitor respondents' compliance with these affirmative action requirements, the district court retained jurisdiction until 1990 and required respondents to report their progress toward meeting that goal.

2. The court of appeals affirmed the district court's class certification order, reversed the entry of judgment in favor of the petitioners, as individual claimants under Title VII, and vacated the affirmative action portions of the district court's remedial order. Pet. App. A24, A7-A9, A16-A18. With respect to the district-wide class that was certified, the court of appeals' entire discussion was as follows (Pet. App. A24; citations omitted):

> On cross-appeal we review the district court's class certification ruling for abuse of discretion . . . and we find no abuse in the denial of a statewide class here.

On the issue of the individual petitioners' Title VII claims, the court of appeals held that the jury's finding that petitioners were not discriminated against under Section 1983 estopped petitioners from recovering for disparate treatment under Title VII. The court of appeals rejected petitioners' assertion that the district court had found for them on a theory of "unintentional" discrimination that did not conflict with the jury's verdict. The court of appeals stated that "[a]s we understand the district court's opinion, . . . the court drew a specific legal conclusion of disparate impact only with regard to Missouri's reliance on word-of-mouth recruiting . . . ." Pet. App. A7. Because "the individual plaintiffs all applied for maintenance positions, "they were not victims of this discriminatory practice [in recruiting applicants]." *Id.* at A7-A8. Accordingly, the court of appeals concluded that the only potential ground on which petitioners

could recover—disparate treatment—was barred by the jury's verdict under Section 1983.

Finally, with respect to the entry of affirmative hiring goals as a remedy, the court of appeals held that the relief was excessive. The court held that there was no basis for accusing Missouri of " 'foot-dragging resistance' to court orders" and therefore no reason to presume that a prohibitory injunction would be a futile gesture at eradicating discrimination. Pet. App. A17, quoting *Local 28 of the Sheet Metal Workers' Int'l Ass'n* v. *EEOC*, 106 S.Ct. 3019, 3051 (1986). The court of appeals expressly declined to go beyond this Court's prior decisions and approve "a court-ordered race- or gender-conscious remedy against a defendant which has not been given a chance voluntarily to bring its personnel practices into compliance with a generalized injunction . . . ." Pet. App. A17. Because the court vacated the affirmative relief, it also vacated the district court's order retaining jurisdiction over the case and the reporting requirements designed to implement the hiring goals. *Id.* at A17-A18. The court of appeals, however, ordered respondents to retain all relevant hiring records and admonished respondents to publicize employment opportunities for women and to demonstrate their commitment to hiring women in maintenance positions. *Id.* at A18.[2]

DISCUSSION

Petitioners have presented three questions that plainly do not warrant review by this Court. With respect to the affirmative action ruling, the court of appeals was completely faithful to this Court's rulings on the propriety of race- or sex-conscious affirmative relief. In addition, the court's decision does not conflict with the de-

[2] The court of appeals also reminded respondents that the 37-48 percent range for potential women hires might "prove a useful standard for Missouri in evaluating its own compliance with our injunction." Pet. App. A18.

cision of any other court of appeals and is, in any event, correct. The estoppel and class certification issues involve matters that affect only the parties to this litigation. The estoppel issue turns solely on the proper interpretation of the district court's opinion and the certification issue involves the application of the settled "abuse of discretion" standard to the facts of this case. Moreover, the court of appeals correctly decided both of those issues.

1. Petitioners argue (Pet. 8-14) that the court below erred in vacating the hiring goal imposed by the district court.[3] They mischaracterize the holding as requiring a showing of contempt before affirmative relief can be granted.

Petitioners' analysis is flawed both in its analysis of the holding below and in its criticism of that holding. First, nothing in the court's opinion requires a finding of contempt as a predicate for imposing an affirmative action remedy. The reasoning of the court of appeals comports fully with the pivotal concurrence of Justice Powell in *United States* v. *Paradise*, 107 S.Ct. 1053, 1074 (1987). In *Paradise*, Justice Powell indicated that a finding of contempt is irrelevant and that the predicate for a race- or sex-based remedy is any kind of persistent violation of rights or repeated failure to carry out court orders. Nothing approaching these conditions is present in this case.

Second, petitioners completely ignore the statement in Justice Brennan's plurality opinion in *Sheet Metal Workers'* that "[i]n most cases, the court need only order the employer . . . to cease engaging in discriminatory practices, and award make-whole relief" to the victims of

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[3] Petitioners also complain separately about the decision to set aside the reporting requirements. But those requirements were imposed by the district court to monitor compliance with the affirmative action obligations. Without these obligations, there is no independent reason to require that respondents automatically provide additional information to the district court.

discrimination. 106 S.Ct. 3019, 3036 (1986). See *id.* at 3054 (Powell, J., concurring) ("an injunction alone is insufficient" only "in cases involving particularly egregious conduct").

The district court did not find that respondents had engaged in any "egregious" conduct. Instead, it merely observed that discrimination by public employers is "distressing and demeaning," Pet. 10, quoting Pet. App. A62.[4] But this Court has never suggested that the standard for imposing race- or sex-conscious relief is different for public as opposed to private employers. There is simply no reason to assume that the Commission will not comply with the district court's injunction. Indeed, the number of female hires in maintenance positions in recent years is strong evidence that respondents are committed to ensuring that there is no future discrimination in hiring.[5]

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[4] Petitioners' statement that "this case involves egregious, longstanding and persistent discrimination" (Pet. 10) is belied by the extraordinary legal reasoning that was required to hold respondents liable at all under Title VII. As we indicated in our petition in No. 87-1415, the courts below imposed liability by denying respondents the benefit of a bottom line defense and by rejecting respondents' use of refined labor pool statistics which showed there had been no discrimination. Given the slender basis for the holding on liability, there is no basis for petitioners' claim that this case justifies an extreme remedy such as the one imposed by the district court. In any event, there is no reason to review the court of appeals' fact-bound resolution of this issue.

[5] As respondents explained in their petition in No. 87-1415, this is not a case where an employer has maintained "clogged channels of opportunity." *Hammon* v. *Barry*, 826 F.2d 73, 78, *reh'g granted, in part, en banc*, 833 F.2d 367 (D.C. Cir. 1987). Eight women had been hired for maintenance positions by respondents even before any judgment was entered. Moreover, it is undisputed that based upon applicant flow data, women had a slightly better chance of being hired than men (2.6 percent compared to 2.5 percent). No. 87-1415, Pet. at 5. Accordingly, this is not a situation that required the kind of extraordinary race- or sex-conscious remedy this Court opposed in *Sheet Metal Workers'* and *Paradise*.

In sum, this Court's decisions indicate that in a garden variety case involving a finding of discrimination, a simple injunction should be the first remedial step. The court of appeals followed that approach in this case and petitioners have cited no case where a court of appeals has required a more intrusive remedy solely on the basis of a finding of liability. The issue presented does not warrant review by this Court.

2. Petitioners argue (Pet. 14-17) that the court of appeals erred in holding that the four individual Title VII claims were barred by the jury's finding that the individual plaintiffs had not been discriminated against. Because that issue is inherently fact bound, petitioners attempt to cast it in terms of whether a disparate impact analysis can ever apply to a subjective hiring process. See *Watson* v. *Fort Worth Bank & Trust*, No. 86-6139. But the court of appeals made no holding on that issue. Instead, it held that a neutral criterion, such as word-of-mouth recruiting, which had a disparate impact only on the class of *potential* women applicants was irrelevant to the individual plaintiffs here because they all had applied for employment. In other words, any disparate impact arising from respondents' recruiting techniques could not, by definition, have affected persons who actually applied. Thus, this Court's disposition of *Watson* can have no possible bearing on the validity of the holding below in this case.[6]

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[6] Petitioners also quarrel with the court of appeals' reading of the district court's opinion. They assert that word-of-mouth hiring was not the only basis for the disparate impact holding. Petitioners claim that "the Court of Appeals missed the [district] court's *findings* regarding the 'unregulated hiring process.'" (Pet. 15, emphasis added). During trial, petitioners did not introduce any evidence or statistical analysis even purporting to focus on any component of the post-application selection process. Thus, the district court was required by the evidence to assess the post-application process under a disparate treatment analysis. Pet. App. A57. Accordingly, the court of appeals did not ignore the district court's

3. Finally, petitioners challenge (Pet. 17-19) the refusal of the courts below to certify the plaintiff class on a state-wide basis. They argue that the district court's findings in its liability opinion indicate that employment policy was set at the state level, not the district level, and thus there were common issues of law and fact at the state level. Also, petitioners assert that the district court's finding of unmanageability was not adequately explained. This issue plainly does not warrant review by this Court.

First, the court of appeals' legal analysis of the proper standard of review of the district court's certification decision is unquestionably correct. Petitioners certainly do not suggest that the court of appeals erred in applying an abuse of discretion standard. Second, the district court committed no error in recognizing that each hiring unit's employment practices would raise unique issues. Nor is this finding undermined by the mere existence of state-wide employment policies and state level review of hiring recommendations. As the district court ultimately found, the actual hiring process was not flawed. Female applicants had a better chance of being hired than male applicants (see n.5, *supra*). Thus, the employment policies at the state level were not a significant issue in this case. Instead, the issues turned on how the individual district implemented recruiting policy. Accordingly, the district court committed no error in declining to expand the class significantly in order to keep the case within manageable limits.

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findings of fact; instead, it held that the district court had reached a specific *legal conclusion* of disparate impact only with respect to word-of-mouth recruiting. Pet. App. A7. The court's holding that that legal conclusion was irrelevant to petitioners' individual claims is clearly correct and in any event does not warrant further review.

CONCLUSION

The petition for a writ of certiorari in No. 87-1416 should be denied.

Respectfully submitted,

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April 6, 1988

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No. 87-1416

In The

Supreme Court of the United States

October Term, 1987

Missouri Highway and Transportation Commission; Robert N. Hunter, Chief Engineer of the Missouri Highway and Transportation Commission and V.B. Unsell, District Engineer for District 8 of the Missouri Highway and Transportation Commission,

Petitioners,

v.

Jane Catlett, Patricia Leembruggen, Grace Tuter and Adeline Kallemyn, Individually and on behalf of all others similarly situated,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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No. 87-1416

In The

Supreme Court of the United States

October Term, 1987

Missouri Highway and Transportation Commission; Robert N. Hunter, Chief Engineer of the Missouri Highway and Transportation Commission and V.B. Unsell, District Engineer for District 8 of the Missouri Highway and Transportation Commission,

Petitioners,

v.

Jane Catlett, Patricia Leembruggen, Grace Tuter and Adeline Kallemyn, Individually and on behalf of all others similarly situated,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF AMICI CURIAE OF MOUNTAIN STATES LEGAL FOUNDATION, THE STATE OF WISCONSIN, AND THE STATE OF WYOMING

Mountain States Legal Foundation (MSLF or the Foundation) respectfully submits this brief amici curiae on behalf of its members, the State of Wisconsin, and the State of Wyoming.[1]

[1] MSLF has obtained the oral consent of the parties. The written consent of the parties shall be filed with the Clerk of the Court immediately upon its receipt by amici.

INTEREST OF AMICI CURIAE

MSLF is a nonprofit, membership, public interest law foundation dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, private property rights, and the free enterprise system. The Foundation's members include public and private employers, many of which have affirmative action plans. MSLF has an extensive background and expertise in civil rights litigation.[2]

The Foundation, the State of Wisconsin, and the State of Wyoming are deeply concerned about the possibility of expanded civil rights liability for public and private employers alike. The Eighth Circuit Court of Appeals' decision creates a rule of decision which authorizes the use of general population statistics to state a claim for intentional discrimination, contrary to the prior opinions of this Court. MSLF, the State of Wisconsin, and the State of Wyoming urge this Court to resolve this question by reaffirming its past decisions.

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[2] MSLF was counsel of record in both *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), and *Johnson v. Transportation Agency, Santa Clara County*, — U.S. —, 107 S. Ct. 1442, 94 L.Ed.2d 615 (1987). In addition, The Foundation has participated as counsel or amicus in many cases defining the scope and application of the Civil Rights Acts and the Fourteenth Amendment. *E.g., Marsh v. Board of Education*, 581 F. Supp. 614 (E.D. Mich. 1984), *aff'd*, 762 F.2d 1009 (6th Cir. 1985), *vacated and remanded*, — U.S. —, 106 S. Ct. 2240, 90 L.Ed.2d 688 (1986); *NAACP v. City of Detroit*, 591 F. Supp. 1194 (E.D. Mich. 1984), *reversed and remanded*, 821 F.2d 328 (6th Cir. 1987); *AFSCME v. State of Washington*, 578 F. Supp. 846 (W.D. Wash. 1983), *rev'd*, 770 F.2d 1401 (9th Cir. 1985), *reh'g denied*, 813 F.2d 1034 (9th Cir. 1987).

STATEMENT OF THE CASE

Amici curiae adopt Petitioners' statement of the case in their petition for writ of certiorari.

SUMMARY OF ARGUMENT

In this case, the Foundation seeks to prevent this nation's civil rights laws from requiring all employers to ensure that their work forces "mirror the general population." Under the Eighth Circuit Court of Appeals' decision, a cause of action based upon a pattern and practice of discrimination in violation of Title VII of the Civil Rights Act may be stated by a combination of raw population statistics and other factors, such as anecdotal instances of alleged discrimination. The Court of Appeals' decision equates, for all practical purposes, the relevant labor market with general population statistics. Moreover, the decision ignores the limitations that this Court has previously placed on the use of work force statistics to infer discrimination.

For twenty years, the consistent rule has been that in a pattern and practice of discrimination case, work force statistics must be based upon the relevant labor market, not the general population. By expanding the definition of "relevant labor market," the Eighth Circuit has interjected uncertainty into this area of the law. Employers, public and private alike, are entitled to know whether their personnel practices are likely to subject them to liability under Title VII, and not have the scope of that liability subject to change. The adverse effects

will be pervasive and profound, affecting employment decisions made throughout this country for many years to come.

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REASONS FOR GRANTING THE WRIT

I. THE EIGHTH CIRCUIT'S DECISION UNDERSCORES THE EXISTENCE OF A DISPARITY AMONG THE DECISIONS OF THE CIRCUITS

Recent decisions of the Seventh, Eighth, and Ninth Circuit Courts of Appeals have used conflicting definitions of the relevant labor market, when determining whether statistical disparities in an employer's work justify inferring intentional discrimination. The Eighth and Ninth Circuits have equated the relevant labor market with the general population.[3] This approach fails to account for any special job requirements which would narrow the appropriate labor market. In contrast, the Seventh Circuit adheres to this Court's long-standing precedent that a labor market is rarely the mirror image of the general population.[4]

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[3] *Catlett v. Missouri Highway and Transportation Commission*, 828 F.2d 1260, 1266 (8th Cir. 1987) (Pet. App. 1a), and *Higgins v. City of Vallejo*, 823 F.2d 351 (9th Cir. 1987).

[4] The decision in *Janowiak v. Corporate City of South Bend*, 836 F.2d 1034 (7th Cir. 1987), was issued very shortly before the Petitioners filed their brief, and therefore Amici Curiae will discuss it at greater length in this brief.

A. The "Relevant Labor Market" Consists of Those Persons Who Are Actually Willing and Able to Do the Work

The use of work force statistics to prove intentional discrimination has been limited to comparisons with the actual labor market, as opposed to those persons in the general population theoretically qualified for the job. The Court of Appeals held that the combination of anecdotal incidents of alleged discrimination, coupled with a statistical imbalance in a predominantly male occupation, was sufficient to find discrimination in a class action under Title VII of the Civil Rights Act, 42 U.S.C. secs. 2000e-2000e-2. *Catlett v. Missouri Highway and Transportation Commission*, 828 F.2d 1260, 1266 (8th Cir. 1987) (Pet. App. 1a). However, this approach conflicts with the recent decision in *Janowiak v. Corporate City of South Bend*, 836 F.2d 1034 (7th Cir. 1987), and is inconsistent with both the majority of the Courts of Appeals, as well as this Court's own decisions.

"Title VII imposes no requirement that a work force mirror the general population." *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 339 n.20 (1977). In *Hazelwood School District v. United States*, 433 U.S. 299 (1977) this Court rejected the use of general population statistics: "[w]hen special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value." *Id.* at 308 n.13.

It is indisputable that the sporadic acts of discrimination alleged could not support the Respondents' "pattern and practice" discrimination charges. "Proving iso-

lated or sporadic discriminatory acts by the employer is insufficient to establish a prima facie case of discrimination; rather it must be established by a preponderance of the evidence that racial discrimination was the company's standard operating procedure—the regular rather than the unusual practice." *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 875-876 (1984).

The use of statistics to infer intentional discrimination against a class has always been subject to careful scrutiny. This Court has recognized that statistics can be manipulated and will not necessarily reveal otherwise demonstrable innocent explanations of discrepancies. An important limit on the use of work force statistics is the specific delineation of the relevant labor market. The Eighth Circuit decision removes the protection against possible abuses by adopting the general population of women as its relevant labor market. Had the Court of Appeals employed the correct labor market definition, it could not have found the Petitioners liable for discrimination.

In this case, the District Court "conservatively" estimated that as of 1980 the relevant labor pool was 37% female. Pet. App. 26a, 31a. This "conservative definition" included all working women between the ages of eighteen and seventy having a driver's license and an eighth grade education. Only managerial, technical, professional and clerical workers were excluded. Pet. App. at 30a-31a.

This labor pool is too broad, because it failed to consider only those individuals willing and able to do the work in question. As this Court stated in *Johnson v.*

Transportation Agency, Santa Clara County, — U.S. —, 107 S. Ct. 1442, 94 L.Ed.2d 615 (1987):

> If a plan failed to take distinctions in qualifications into account in providing guidance for actual employment decisions, it would dictate mere blind hiring by the numbers . . . "regardless of circumstances such as economic conditions or the number of qualified minority applicants."

107 S. Ct. at 1454, *quoting, Local 28, Sheet Metal Workers' International Association v. Equal Employment Opportunity Commission*, 478 U.S. 421 (1986) (O'Connor, J., concurring in part, dissenting in part).

Nor is it evident that economic considerations referred to in *Johnson*, were taken into account.[5] Even given an ability to do the work, quite a large number of women, particularly those who have established experience in other types of work, would never accept the reduction in salary and prestige associated with this *entry level* position. In *Equal Employment Opportunity Commission v. Sears, Roebuck & Co.*, 628 F. Supp. 1264 (N.D. Ill. 1986), *aff'd*, 839 F.2d 302 (7th Cir. 1988), the court recognized that women were not as interested as men in certain types of duties, hours, and compensation schemes. 628 F. Supp. at 1305-1312.

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[5] In the determination of the relevant labor pool, both the District Court and the Eighth Circuit failed to fully consider the requirements for the maintenanceman position at issue in this case. Among other things, the position requires "mowing the right-of-way, plowing snow off the roads in winter, filling potholes, maintaining buildings and rest areas, and performing minor maintenance tasks on equipment." Pet. App. at 29a. The fact that many otherwise willing women under the age of seventy would not be physically able to fill potholes, or work effectively in the temperature extremes routinely experienced in highway work was never considered.

B. The Seventh Circuit Court of Appeals Has Correctly Articulated the Definition of a Relevant Labor Market

The Seventh Circuit Court of Appeals in *Janowiak* held that an affirmative action plan violates the Fourteenth Amendment and Title VII, if it is based solely upon a disparity between the percentage of minorities in the city's population and the percentage hired by the police and fire departments. The Seventh Circuit followed the correct rule that the relevant labor market for purposes of Title VII is not the same as the general population. "If a job category requires that applicants possess minimum qualifications, the City's proffered statistical comparison must narrow its focus to those actually qualified for the position." 836 F.2d at 1040.

In contrast, the Ninth Circuit in *Higgins v. City of Vallejo*, 823 F.2d 351 (9th Cir. 1987), upheld an affirmative action plan that used general population statistics coupled with a pay and promotion survey.[6] The *Janowiak* court attempted to distinguish *Higgins* as holding that "in [*Higgins*] the *Johnson* manifest imbalance standard was satisfied, even though none of the FEPC's statistical comparisons took into account the relevant *qualified* area labor pool for firefighters or firefighters/engineers." 836 F.2d

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[6] The California Fair Employment Practices Commission (FEPC) had investigated the City's employment practices in 1973, and found that minority composition of the workforce was 40% of that of the general population. In addition, the survey suggested that blacks were paid considerably less than whites, and that historically blacks had been hired and promoted in fewer numbers than whites. *Higgins v. City of Vallejo*, 823 F.2d 351, 356 (9th Cir. 1987).

at 1038-1039. Despite the Seventh Circuit's distinctions, the holding in *Higgins* is inconsistent with this Court's prior decisions.

The Eighth Circuit decision in *Catlett* represents an entirely different interpretation of the rule in *Johnson*. In *Catlett*, the court authorizes the use of general population statistics with other, less tangible factors to state a cause of action. This marks a departure from previous pattern and practice decisions. More importantly, there is little guidance for employers, or the judiciary. Instead, statistical disparities between the general population and a given employer's work force imposes strict liability on even good faith affirmative action plans.

Such a result ignores the fact that inferences from statistics should be used with great care, and particular scrutiny should be used in determining the relevant labor market. The same definition of a relevant labor market must be applicable to all similar circumstances. The relevant labor market for teachers, for example, should reflect those persons who are willing and able to teach, rather than a rudimentary demographic profile coupled with other considerations.

II. THE DISPOSITION OF THIS CASE WILL HAVE A WIDESPREAD AND PROFOUND IMPACT UPON FEDERAL, STATE AND LOCAL GOVERNMENTS, AS WELL AS PRIVATE BUSINESSES THROUGHOUT THE UNITED STATES

The Eighth Circuit's reasoning creates an indeterminate "sliding scale," which permits a comparison of the employer's work force to general population statistics in certain, unspecified circumstances to infer intentional dis-

crimination. Employers having a good faith belief that their hiring practices are in compliance with the law will face the continuing prospect of *post hoc* liability. Most employers would look to specific relevant labor markets in analyzing possible liability under Title VII, and the need to adopt affirmative action plans. By expanding that labor market to be essentially equivalent to the general population, the Eighth Circuit requires an employer's work force to "mirror the general population." *International Brotherhood of Teamsters*, 431 U.S. at 339 n.20 (1977). This contradicts the precedent of this Court and the intent of Congress in enacting Title VII.

In addition, if the federal courts routinely use numerous other "factors" such as anecdotal evidence, to validate the use of population statistics, the stability and integrity of the enforcement of Title VII of the Civil Rights Act will be very much in question. Without a general, universally applicable rule, both the public and private sectors will face substantial difficulties in creating and implementing voluntary affirmative action plans, which have traditionally been based on specifically delineated labor markets. According to one survey, at least 192 state and local governmental entities have affirmative action plans.[7] This number does not include the thousands of private employers nationwide which have either voluntarily implemented such plans, nor other employers who

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[7] The "Report of the Minority Business Development Legal Defense and Education Fund on Minority Business Enterprise Programs of State and Local Governments," available from the Academy for State and Local Government, 444 N. Capitol Street, N.W., Suite 349, Washington, D.C. 20001.

have not adopted plans on the basis of a good faith belief that no such plan was warranted.

It is, quite simply, impractical to create rules that require judicial intervention whenever a work force does not mirror the general population. Such a result will only increase litigation and will not advance the goal of ending discrimination.

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CONCLUSION

There is a clear and immediate need for this Court to resolve the inconsistency among the decisions of the Courts of Appeals, and to reaffirm the limits on the use of relevant labor market statistics in inferring a pattern and practice of discrimination in civil rights litigation. The standard advocated by the Eighth Circuit replaces the stability and predictability of prior decisions of this Court with chaos. The Court should grant the Certiorari Petition and remedy the confusion that exists.

> [N]o man can be sure that he may not be tomorrow the victim of a spirit of injustice, by which he may be a gainer today. And every man must now feel that the inevitable tendency of such a spirit is to sap the foundations of public and private confidence and to

introduce in its stead universal distrust and distress.[8]

Dated this 6th day of April, 1988.

Respectfully submitted,

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[8] *The Federalist, No. 78* (A. Hamilton).